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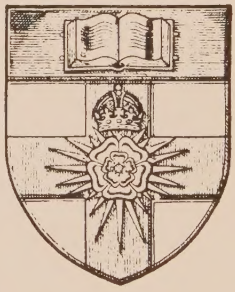

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THE

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QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

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AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1896.

THE QUEEN *v.* JUSTICES OF KENT.

1896
April 23.

Licensing Acts—Quarter Sessions—Appeal from Licensing Justices—Party to Appeal—Costs—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 5.

At a general annual licensing meeting a person objected to the renewal of a certain licence, with the result that the licence was refused. The licensed person appealed to the quarter sessions, and obtained a renewal of his licence. On the hearing of the appeal the objector did not appear:—

Held, that the objector was a "party" to the appeal within the meaning of s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, notwithstanding that he did not appear to prosecute it, and that the quarter sessions had jurisdiction to order him to pay the costs of the appeal.

Reg. v. *Justices of Gloucestershire* (68 L. T. (N.S.) 225) followed.

CERTIORARI to bring up to be quashed an order made by the justices of Kent in quarter sessions ordering F. S. Boulter to pay the costs of a certain licensing appeal.

In the month of August, 1895, George Sharp was the holder of a licence to sell intoxicating liquors at a public-house known

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as the Duke of Cambridge, situate in the borough of Dover. On August 17, Boulter served upon the said George Sharp statutory notice of intention to object to the renewal of his licence at the general annual licensing meeting. On August 26, 1895, Boulter appeared at the licensing meeting and opposed the renewal of Sharp's licence, with the result that the justices refused to renew it. On August 29 notice was served by Sharp upon Boulter of intention to appeal to the quarter sessions against the decision of the licensing justices. On October 15 the appeal came on for hearing before the quarter sessions for the county of Kent holden at Canterbury; but Boulter did not appear to pursue his opposition to the renewal of Sharp's licence.

The quarter sessions reversed the decision of the licensing justices and renewed the licence. They also ordered Boulter, as the respondent to the appeal, to pay the costs of the appeal, which costs were taxed at 73*l.* 1*s.* 8*d.* A rule nisi having been obtained for a certiorari to bring up the said order as to costs to be quashed.

Dickens, *Q.C.*, and *Bodkin* (*Lawson Walton*, *Q.C.*, with them) shewed cause. The quarter sessions had jurisdiction to order the objector to pay the costs of the appeal which was rendered necessary in consequence of his objection. They had indeed no jurisdiction to do so under the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 27, which is the Act under which the appeal was brought. For under that Act the Court, in the event of the appeal being successful, could only give costs against the justices appealed from, who were to be indemnified by the county (s. 29). Under s. 27 of that Act notice of appeal was not required to be given to any one except the justices. But the sessions had jurisdiction to make the order under the Summary Jurisdiction Act, 1879. By s. 32 of that Act, where a person is authorized by any past Act (which is the case here) to appeal from any "order of a court of summary jurisdiction," he may appeal subject to the conditions and regulations specified in s. 31. And by s. 31 an appeal from an "order of a court of summary jurisdiction" shall be subject to the conditions

and regulations (inter alia) that "(2.) The appellant . . . . shall give notice of appeal by serving on the other party and on the clerk of said court of summary jurisdiction notice in writing of his intention to appeal"; and "(5.) The Court of Appeal may also make such order as to costs to be paid by either party as the Court may think just." If, therefore, the order of the licensing justices refusing Sharp's licence was an order of a court of summary jurisdiction, and Boulter, the objector, was a party to the appeal, the Court had jurisdiction to give costs against him under that section. Justices sitting for licensing purposes are now a court of summary jurisdiction: *Reg.* v. *Justices of Glamorganshire.* (1) For by s. 13, sub-s. 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), which re-enacts the definition given in s. 7 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), a "court of summary jurisdiction" is defined to mean "any justice or justices . . . . to whom jurisdiction is given by or who is authorized to act under the Summary Jurisdiction Acts . . . . and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." Secondly, Boulter was a party to the appeal. Notice of appeal is now required by s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, to be served "on the other party, and on the clerk of the said court of summary jurisdiction." And in the case of a licensing appeal, unless the justices choose to make themselves parties by taking an active part in opposing the appeal (see *Reg.* v. *Justices of London* (2)), which in the present case the licensing justices did not do, there is no person who can fill the position of "the other party" except the objector. In *Reg.* v. *Justices of Gloucestershire* (3) it was expressly held that the objector was "the other party" referred to in sub-s. 2, and that service of notice of appeal upon him was a condition precedent to a right to have the appeal heard. In *Price* v. *James* (4), where a case was stated under the Summary Jurisdiction Act, 1879, for the opinion of the High Court with reference to the refusal of a licence, it was held that the person who

(1) [1892] 1 Q. B. 621.
(2) [1895] 1 Q. B. 616.
(3) 68 L. T. (N.S.) 225.
(4) [1892] 2 Q. B. 428.

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appeared before the licensing justices to oppose the licence was rightly made respondent. It makes no difference that Boulter did not appear on the appeal. In *Reg.* v. *Purdey* (1) a person who had been summarily convicted of an offence appealed to the quarter sessions. No one appearing to support the conviction, it was quashed. It was held that, by virtue of s. 5 of 12 & 13 Vict. c. 45, which provides that upon an appeal the Court may order "the party or parties against whom the same shall be decided" to pay the costs, the sessions had power to order the original informer to pay the costs of the appeal, notwithstanding that he did not appear. In *Rex* v. *Justices of Hants* (2), where a person successfully appealed against a conviction under a turnpike Act, which provided that on any appeal the quarter sessions might give costs to the "party appealing or appealed against," it was similarly held that costs might be given against the informer though he did not appear; and the case of *Reg.* v. *Smith* (3) is to the same effect.

Asquith, Q.C., and *Blaiklock*, in support of the rule. The quarter sessions had no jurisdiction to make the order. With regard to the first point, that the refusal of the licensing justices to renew the licence was an order of a court of summary jurisdiction, it must be conceded that it cannot be disputed in this court, being concluded by the decision in *Reg.* v. *Justices of Glamorganshire*. (4) But Boulter was not a "party" within the meaning of s. 31, sub-s. 5. The word "party" there means "the party litigating the appeal." The fact that he was the objector before the licensing justices is not enough to make him a party, and liable as such for the costs of the appeal. For the justices might have taken the objection themselves, the Licensing Act, 1872, having in no respect cut down the absolute discretion which they had under the Act of 1828 to refuse the renewal of a licence. But if the justices had taken the objection themselves, they could not have been held liable for costs unless they had appeared on the appeal and actively opposed the licence: *Reg.* v. *Justices of London*. (5) And the

(1) 5 B. & S. 909.
(2) 1 B. & Ad. 654.
(3) 29 L. J. (M.C.) 216.
(4) [1892] 1 Q. B. 621.
(5) [1895] 1 Q. B. 616.

same rule which applies to the justices when the objection is taken by them must equally apply to any other objector. The language of the judges in that case directly suggests that a person may object to the licence without making himself a party to the proceedings; thus Lindley L.J. says: "If there is an objector who is the real party, &c." (1); and A. L. Smith L.J. says that "the word 'party' in sub-s. 5 of s. 31 means . . . . a litigant party to the appeal." (2) The earlier case of *Reg.* v. *Goodall* (3), which was decided under a different statute, was to a similar effect. The cases cited on the other side, such as *Reg.* v. *Purdey* (4) and *Rex* v. *Justices of Hants* (5), are no authorities against this contention; for there the person, who was held liable for costs despite his non-appearance on the appeal, was the person who originally set the Court in motion by laying an information. But here the Court is set in motion by the licensed person in applying for the renewal of his licence. All that the objector does is to discharge a public duty in informing the mind of the Court—a duty which, if the contention of the other side is right, members of the public will in the future be very loth to perform. The only difficulty in the present case arises from the decision in *Reg.* v. *Justices of Gloucestershire.* (6) But that case proceeded upon a mistaken interpretation of *Price* v. *James* (7), by which case the Court thought themselves bound. In *Price* v. *James* (7) the superintendent of police, who was held to have been rightfully made respondent to a special case, assented to his being made respondent, and instructed counsel to appear and argue the case on his behalf. Lord Esher said: "I think a person who had so objected would be properly made respondent, *if he chose*, and, if so made respondent, would be liable to pay costs if unsuccessful." That case in no way supports the proposition that an objector may be made respondent to an appeal against his consent.

(1) [1895] 1 Q. B. at p. 630.
(2) [1895] 1 Q. B. at p. 636.
(3) L. R. 9 Q. B. 557.
(4) 5 B. & S. 909.
(5) 1 B. & Ad. 654.
(6) 68 L. T. (N.S.) 225.
(7) [1892] 2 Q. B. 428.

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LORD RUSSELL of KILLOWEN C.J. I am of opinion that this rule must be discharged. One cannot have listened to the discussion in this case without seeing that the question involved is one of very general importance, and that the law relating to it is in a very unsatisfactory condition. I say that it is a question of great importance for this reason, that whereas the Legislature have empowered persons to come before the licensing justices, upon the occasion of an application for the renewal of a licence, and oppose such renewal, it is obvious that that salutary power will become very limited in its exercise if parties who think that they ought in the public interest to object to the renewal of a licence are deterred from so doing by the danger of being visited with costs, or possibly of being committed to a long and expensive course of litigation. There is also in the present case a further very important question, which is outside that with which we are immediately concerned—namely, whether the decision in *Reg.* v. *Justices of Glamorganshire* (1) is a correct exposition of the law, and whether procedure under the Licensing Acts is to be treated for all purposes as analogous to an ordinary case of litigation before justices, in which there is a distinct informant or complainant, and a distinct person called upon to answer the matters in the information or complaint. But it is enough for the purposes of this case to say that that decision is binding upon this Court, and that in view of it we must assume that the refusal of the licensing justices to renew Sharp's licence was an "order of a court of summary jurisdiction" within the meaning of ss. 31 and 32 of the Summary Jurisdiction Act, 1879.

Then, it having been provided by sub-s. 5 of that same section that, on an appeal to the quarter sessions against such an order, the Court of Appeal may "make such order as to costs to be paid by either party as the Court may think just," the sole question which we have to decide is whether upon the facts of this case Boulter, the person who objected to the renewal, was a "party" to the appeal within the meaning of that subsection. Now the facts were these. Sharp, the licensed person,

(1) [1892] 1 Q. B. 621.

applied for a renewal of his licence, and Boulter, having given due notice of objection, appeared before the licensing justices in support of his objection, and succeeded in satisfying them that the licence ought not to be renewed. Then Sharp appealed to the quarter sessions, and on that appeal Boulter, who had been duly served with notice of Sharp's intention to appeal, did not appear or take any part whatever. The quarter sessions allowed the appeal and granted the licence, and made an order upon Boulter, who was not before them, to pay a considerable sum of money for costs. Under those circumstances I think that Boulter was a party to the appeal, and that the quarter sessions consequently had jurisdiction to make the order upon him which they did. If the question were arising now for the first time, there would, I think, be a good deal to be said in favour of the opposite view. But the question seems to me to be covered by authority. In *Reg.* v. *Justices of Gloucestershire* (1) a superintendent of police opposed an application for the renewal of a licence, and the licence was refused. From that refusal the licensed person appealed to the quarter sessions, and served the notice of appeal upon the clerk to the licensing justices, but not upon the superintendent. The quarter sessions refused to entertain the appeal upon the ground that the notice had not been served upon the superintendent in accordance with the requirements of s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, which provides that notice of appeal shall be served on "the other party" as well as on the clerk to the justices. On an application for a mandamus to the quarter sessions to hear the appeal, it was held that the person objecting to the renewal before the licensing justices is the "other party" to the appeal within the meaning of sub-s. 2, and the mandamus was accordingly refused. It seems to me impossible to give a different meaning to the words "other party" in sub-s. 5 from that which is given to them under sub-s. 2, or to suppose that they do not refer to one and the same person, namely, the person objecting before the licensing justices. The case of *Price* v. *James* (2) also points in the same direction; while the case *Reg.* v. *Purdey* (3) is a

(1) 68 L. T. (N.S.) 225. (2) [1892] 2 Q. B. 428.
(3) 5 B. & S. 909.

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direct authority to shew that a person who was a party to a proceeding before the justices in the Court below is none the less a party to the appeal because he does not appear before the Appeal Court to resist the appeal. Upon these grounds I think the rule must be discharged.

WRIGHT J. I am of the same opinion. Boulter made an objection which in fact had the effect of preventing the renewal of Sharp's licence, and thereby obliged Sharp to appeal; and I cannot see that there is anything unjust in giving Sharp the costs of his appeal, if the quarter sessions had power to give them. Whether they had that power depends on two questions—first, whether the provisions of the Summary Jurisdiction Act, 1879, have been applied by the Interpretation Act, 1889, to licensing proceedings; and, secondly, whether Boulter could be said to be a party to the appeal. Upon both questions I think we are bound by authority. Some years before the decision in *Reg.* v. *Justices of Glamorganshire* (1) there was a decision the same way upon the Summary Jurisdiction Act, 1884, the language of which is in terms identical with those of the Interpretation Act, 1889. It seems incredible that any lawyer should have really meant to apply in that wholesale and rough and ready way the provisions of the Summary Jurisdiction Act, 1879, to matters to which they had never been in fact applied before, and to which they were not reasonably applicable. But there is the section, and we cannot help it. Upon the other point we are bound by *Reg.* v. *Justices of Gloucestershire* (2), which decides that the party objecting before the licensing justices is to be treated, for some purposes at any rate, as an objector in relation to the appeal, and therefore as a party to the appeal.

Rule discharged.

Solicitors for objector: *Hicks, Davis & Hunt.*
Solicitors for Sharp: *Godden, Son & Holme.*

(1) [1892] 1 Q. B. 621. (2) 68 L. T. (N.S.) 225.

J. F. C.

WATSON *v.* WHITE.

1896
May 8.

County Court—Jurisdiction—Neglect to Levy Execution—Action against High Bailiff—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 35, 43, 49.

An action will lie to recover damages against the high bailiff of a county court, at the suit of a party aggrieved by his neglect in the performance of his duties as high bailiff, notwithstanding the provisions of s. 49 of the County Courts Act, 1888, enabling the county court judge, in such cases, to order the high bailiff to pay damages to the party aggrieved.

Application by the defendant, the high bailiff of the Whitechapel County Court, for a prohibition to prohibit the hearing and determination of an action brought against him by the plaintiff in the City of London Court.

The plaintiff in the present action had brought an action in the City of London Court against A. Duboth & Co., who carried on business within the district of the Whitechapel County Court, and obtained judgment. Thereupon the warrant of execution was sent to the registrar of the Whitechapel County Court for execution, and by him issued to the defendant under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 158. The plaintiff afterwards brought the present action against the defendant in the City of London Court to recover damages for having refused to levy, or because, having levied he withdrew from possession without the consent, and against the instructions, of the plaintiff. When the case came on for hearing objection was taken on behalf of the defendant to the jurisdiction of the Court, and the judge adjourned the hearing in order to give the defendant an opportunity of moving for a prohibition.

Poley, for the defendant, in support of the application for a prohibition. The City of London Court has no jurisdiction to entertain this action. The office of high bailiff is created by statute, and a liability is imposed upon the high bailiff by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 49 (1), by which

(1) 51 & 52 Vict. c. 43, s. 49: "In case any bailiff of any court who shall be employed to levy any execution against goods and chattels shall, by

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the judge can order a bailiff to pay damages to a party aggrieved by his neglect, connivance, or omission. This liability, thus specially imposed by statute, excludes any other liability to which the high bailiff might otherwise be subject, and therefore takes away any remedy against him by action. [He referred to *Reg.* v. *Judge of County Court of Shropshire* (1); *Reg.* v. *County Court Judge of Essex.* (2)]

Loehnis, for the plaintiff, referred to the County Courts Act, 1888, s. 43 (3) and *Partridge* v. *Elkington.* (4)

[He was stopped.]

LORD RUSSELL of KILLOWEN C.J. The defendant's counsel has been unable to produce any authority, the effect of which is to support the contention which he has put forward on behalf of the defendant. The decision in *Reg.* v. *Judge of County Court of Shropshire* (1) has nothing whatever to do with the question which comes before us in the present case. In that case it was held that the jurisdiction which was given by s. 115 of the County Courts Act, 1846, to a county court judge, enabling him to order a bailiff to compensate a plaintiff who had suffered damage by his neglect, connivance, or omission, in levying an execution, could only be exercised by him against the bailiffs of his own court. We were also referred to the decision of the Court of Appeal in *Reg.* v. *County Court Judge of Essex* (2);

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neglect, or connivance, or omission, lose the opportunity of levying any such execution, then upon complaint of the party aggrieved by reason of such neglect, connivance, or omission (and the fact alleged being proved to the satisfaction of the Court on the oath of any credible witness), the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto; and upon demand made thereof, and on his refusal so to pay and satisfy the same, payment thereof shall be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the court."

(1) 20 Q. B. D. 242.

(2) 18 Q. B. D. 704.

(3) 51 & 52 Vict. c. 43. By s. 43, "If an action be brought against an officer of a county court, the summons may issue in the district of which he is an officer, or in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer."

(4) L. R. 6 Q. B. 82.

but all that the Court there decided was, that a county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17. Therefore neither of the two cases referred to has any application to the present case. Now what are the facts of this case? The high bailiff of a county court is the creation of a statute, which casts upon him certain obligations, but although created by statute he is subject to a common law liability, so that if any one is injured by his neglect to carry out the duties imposed upon him by statute, he is liable to an action. Sect. 49 of the County Courts Act, 1888, authorizes a county court judge to deal with an officer of his own court, by ordering him in the cases therein specified to pay compensation to a person who has sustained damage by his neglect or default; but we ought not to construe that section as providing the only remedy available against the high bailiff of a county court in case of neglect. This view is supported by the provisions of s. 35 of the same Act, by which "every such high bailiff shall be responsible for all the acts and defaults of himself, and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers." That section, therefore, imposes upon the high bailiff the liability to an action, to which the sheriff is subject; and, in addition to that, s. 49 gives a summary remedy; but s. 49 does not deprive the party aggrieved of any already existing remedy.

For these reasons I am of opinion that the application for a prohibition must be refused with costs.

WILLS J. concurred.

Application refused.

Solicitors for plaintiff: *Aldous & Welfare.*

Solicitors for defendant: *M. Webb & Sons.*

P. B. H.

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April 21.

In re SASS.
Ex parte NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED.

Bankruptcy—Proof—Principal and Surety—Guarantie to Bank—Surety for whole Debt, but Liability limited in Amount—Payment by Surety—Proof by Bank for whole Debt.

A surety guaranteed a bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from their customer S., but nevertheless the total amount recoverable from the surety was not to exceed 300*l*. The guarantie was to be a continuing security, and any dividends which the bank might receive on the bankruptcy of S. were not to prejudice their right to recover from the surety to the full extent of the guarantie any sums which after the receipt of such dividends might remain owing to them by S.

S. became bankrupt, and the bank, after receiving the 300*l*. from the surety, claimed to prove in the bankruptcy for the full amount due to them from S. The trustee in bankruptcy contended that the proof ought to be reduced by the amount the bank had received from the surety:—

Held, that the bank were entitled to prove for their whole debt without any deduction.

This was an appeal by the above-mentioned bank from the decision of the trustee in bankruptcy in rejecting their proof against the estate of the bankrupt.

In 1887 E. Sass, the bankrupt, being indebted to the bank on his banking account with them, one Stourton agreed to guarantee the account, and accordingly signed the following form of guarantie in their favour:—

"I hereby guarantee to you the payment of any sum or sums of money which may be now or may hereafter from time to time become due or owing to your bank anywhere from or by E. Sass his executors or administrators (who are all hereinafter referred to as 'the said debtor') either solely or jointly with any other person or persons in partnership or otherwise upon banking account or upon any discount or other account or for any other matter or thing whatsoever including the usual banking charges. This guarantie is to be a security for

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In re Sass. *Ex parte* National Provincial Bank of England.

the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the said debtor but nevertheless the total amount recoverable hereon shall not exceed 300*l.* in addition to such further sum for interest and other banking charges and for costs as shall accrue after the date of demand by you upon me for payment. This guarantie is to be in addition and without prejudice to any other securities which you may now or hereafter hold from or on account of the said debtor and is to be binding on me my estate and effects as a continuing security notwithstanding any settlement of account or my being under any disability or my death until the expiration of one calendar month from the time when you shall receive notice in writing to the contrary from me my executors administrators or legal representatives.

* * * * *

"You are to be at liberty without thereby affecting your rights hereunder at any time to determine or vary any credit of the said debtor to vary exchange or release any securities held or to be held by you from or on account of the said debtor to renew bills or promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the said debtor or any obligants on bills notes or securities held or to be held by you from or on behalf of the said debtor. And in case of bankruptcy liquidation by arrangement or composition with creditors any dividends you may receive from the estates of the said debtor or others shall not prejudice your right to recover from me my executors or administrators to the full extent of this guarantie any sum which after the receipt of such dividends may remain owing to you by the said debtor."

In June, 1894, E. Sass became bankrupt, and subsequently Stourton, on demand by the bank, paid them 303*l.* 11*s.* 9*d.* under his guarantie, which sum they carried to a realized securities account, and then tendered a proof against the bankrupt's estate for 755*l.* 16*s.* 1*d.*, being the whole amount due to them from the bankrupt. The trustee rejected the proof, insisting that it ought to be reduced by the 303*l.* 11*s.* 9*d.* which

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In re SASS.

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the bank had received from Stourton. The bank appealed from his decision.

H. Reed, Q.C., and *Yate Lee*, for the bank. Under a guarantie like this the suretyship is for the whole debt, although the liability of the surety is limited to 300*l*. The bank are, therefore, entitled to prove for the whole amount due to them from the bankrupt: *In re Sellers* (1); *Midland Banking Co.* v. *Chambers* (2); *Commercial Bank of Australia* v. *Wilson* (3); and it is immaterial whether the surety pays before or after the proof is made: *In re Blakeley* (4); *In re Rees.* (5) The rule as to deducting from a proof the amount received from a surety only applies to bills and negotiable instruments: *In re Blackburne.* (6)

Muir Mackenzie, for the trustee in bankruptcy. The question turns upon the exact terms of this guarantie, which are not the same as those in the cases referred to. This is a floating security for a continuing liability, and the surety has not bargained away his right to prove against the principal debtor. The last clause of the guarantie only provides that the bank can sue the surety even if they prove for and receive dividends on their whole debt: *Ellis* v. *Emmanuel.* (7) Here the principle of *In re Blakeley* (4) applies, and the surety can prove for the amount he has paid: *Ex parte Wildman.* (8) The case of *In re Rees* (5) is distinguishable. There the guarantie was not the same in its form, and the surety paid after the bank had proved for their whole debt.

VAUGHAN WILLIAMS J. In this case the trustee rejected the proof, and I think he was wrong in so doing. I think that the common law right of the bank here was to sue the debtor for the whole amount that was due from him to them, irrespective of the sum which was paid by the surety, unless that sum amounted to 20*s.* in the pound. When bankruptcy supervened the right of the principal creditor—the bank—was to prove for

(1) 38 L. T. (N.S.) 395.
(2) L. R. 4 Ch. 398.
(3) [1893] A. C. 181.
(4) 9 Morrell, 173.
(5) 17 Ch. D. 98.
(6) 9 Morrell, 249.
(7) 1 Ex. D. 157.
(8) 1 Atk. 109.

that amount, unless there was a surety and that surety was a surety for a part of the debt. In that case, if the surety is a surety for part of the debt, and the surety has paid that part, then by virtue of that payment the right of proof, which would have been the right of proof of the principal creditor, becomes pro tanto the right of proof by the surety. The surety has a right, having paid part of the debt in that way, to stand pro tanto in the shoes of the principal creditor; and even if the principal creditor has proved and has received the dividend, and the surety comes and repays the full amount, the principal creditor would then be trustee for the surety of the amount of the dividend which he had so received. In my judgment that right of the surety as against the principal creditor only arises in a case where the surety has paid the whole of the debt. It is quite true that where the surety is surety for a part of the debt as between the principal creditor and the debtor, the right of the surety arises merely by payment of the part because that part, as between him and the principal creditor, is the whole. Now for the purpose of this guarantie all I have to determine here is, whether, as between the bank and the surety, the surety became a surety for the whole of the debt or for a part. In my judgment the surety here became a surety for the whole of the debt. It is true that his liability was to be limited; but still, notwithstanding that, his suretyship was in respect of the whole debt, and he, having paid only a part of that debt, has in my judgment no right of proof in preference or priority to the bank to whom he became guarantor. I should have said that myself upon the first paragraph in this guarantie; but if there was any doubt about it, it seems to me that the last clause is also amply sufficient, either by itself or in conjunction with the earlier parts of the guarantie, to shew that, as between the bank and the surety, the bargain was that the bank should have the benefit of all sums paid by the debtor whether by way of dividend or otherwise, and of all securities held by the bank against the debtor's liability, until the whole amount of the debt due from the debtor to the bank was discharged; and that it would have been manifestly wrong on the words of this guarantie to hold that the surety could, as against the bank,

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get any right to dividend or security or anything else by reason of the payment of this part of what was to be treated, as between him and the bank, as the whole debt, unless and until the bank had received every sixpence of the full debt. I think therefore that this proof should have been admitted; and there will be judgment accordingly with costs.

Solicitors: *Wilde, Berger & Moore; W. Murton.*

H. L. F.

C. A.

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Feb. 24; *March* 4, 6; *May* 14.

[IN THE COURT OF APPEAL.]

NOURSE *v.* LIVERPOOL SAILING SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION.

Insurance (Marine)—Life Salvage—Lloyd's Policy—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 544, 552.

Life salvage paid under the Merchant Shipping Act, 1894, s. 544, is not recoverable upon a Lloyd's policy in the usual form.

ACTION tried before Mathew J. as a commercial cause.

The following statement of facts is taken from the judgment:—

This was an action brought to recover from the defendant association the proportion of salvage paid by the plaintiff as owner of the sailing vessel *Arno*, and the costs incurred in the salvage suit, amounting together to 565*l.* 13*s.* 8*d.* The *Arno* had been duly entered in the Class 1 protection of the defendant association. On March 31, 1895, the vessel was in great peril in mid-Atlantic, and the master and crew were rescued by the *Normannia* steamer. It is agreed that the master and crew were justified in abandoning the *Arno*. On April 3 the *Arno* was picked up by the SS. *Merrimac*, and was brought to Liverpool by a salvage crew. On April 25 proceedings in rem were taken by the life salvors against the owner of the *Arno*, and in the suit the sum of 1020*l.* was awarded by the Admiralty Court to the owner, master, and crew of the *Normannia* for life salvage. The plaintiff paid the sum of 438*l.* as the proportion due from the ship in respect of the award. He also paid

39*l.* 4*s.* 6*d.* as his proportion of the costs recovered by the salvors, and incurred a liability to the amount of 80*l.* 8*s.* 4*d.* in defending the action.

By rule 13 of the rules of the defendant association, the following risks were covered in Class 1: "(A) Loss of life or personal injury, howsoever and to whomsoever the same may be caused, and life salvage. (I) Costs and charges which a member may become liable to pay in respect of any of the above-mentioned risks." And rule 18 provided that: "No contribution or payment shall be made in respect of any loss which is capable of being insured against by the usual form of Lloyd's policy with the running down clause attached, or in respect of which there exists a right to recover under any policy which may have been entered into; and in estimating and adjusting the claim of any member he shall be deemed to have effected such policy, and to be entitled to recover under the same."

The defendants called witnesses to prove that, according to the custom or practice at Lloyd's, such losses were invariably paid by the underwriters without objection; but the learned judge held that the evidence failed to establish any such course of business. They contended that rule 18 relieved them from all liability.

Sir Walter Phillimore, L. Batten, and *Balloch,* for the plaintiff.

[They cited *Eglinton* v. *Norman* (1); *Dent* v. *Smith.* (2)]

Joseph Walton, Q.C., and *Carver,* for the defendants.

[They cited *Aitchison* v. *Lohre* (3); *De Vaux* v. *Salvador* (4); Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 544, 545.]

March 6. MATHEW J., after stating the facts as above, and reading rule 13 (A) and (I), proceeded as follows:—

If these rules stood alone there would seem to be no question of the plaintiff's right to recover. But it is said that the

(1) 46 L. J. (Ex.) 557.
(2) L. R. 4 Q. B. 414.
(3) 4 App. Cas. 755, 764.
(4) 4 A. & E. 420.

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Mathew J.

liability of the defendant association in respect of life salvage is controlled and cancelled by rule 18. [The learned judge read that rule.] It would seem clear that whoever prepared the rules had intended that life salvage should be payable by the association. But it was argued by the defendants' counsel that this view was a mistake, because the loss was undoubtedly covered by a Lloyd's policy.

An attempt was made to shew that, according to the custom or practice at Lloyd's, such losses were invariably paid by the underwriters without objection. But the evidence failed to establish any such course of business. Then an alternative view was presented on behalf of the defendants, namely, that, even though there was no such custom or practice, life salvage ought to be held as matter of law to be covered under the usual form of Lloyd's policy. Reference was made to the Treatise on Salvage by Kennedy J., pp. 47 and 49, where the earlier statutes on the subject are discussed; and it is pointed out that by the Merchant Shipping Act, 1894, as by the 17 & 18 Vict. c. 104, a lien was created which was enforceable in the Admiralty Court in favour of life salvors against ship or cargo. This lien, it was said, was similar to that existing in favour of salvors of property, and, as salvage services to property were borne by the underwriters, the amount payable for life salvage must be borne in the same way. It is true that salvage services to property are charged upon the underwriters, but this is on the ground, as stated by Lord Blackburn in *Aitchison* v. *Lohre* (1), that the salvor's lien is created by the law maritime, and the burden is on that account properly transferred to the underwriters. But the law maritime provided no reward for saving life and, if it were not for the statutes on the subject, there would be no ground for suggesting that any such liability could be imposed upon the underwriters. The Court of Admiralty no doubt had followed the practice, where life and property had been saved by one set of salvors, of awarding a larger amount of salvage than if property only had been saved. But for life salvage alone no suit for salvage could be maintained.

(1) 4 App. Cas. 755.

The enactments on the subject do not, it appears to me, identify the two classes of salvage services. The award to life salvors is "by way of salvage"—in other words, it is a reward apportioned in the same way as the reward for salvage services to property. But it is essentially different for the reason that salvage of life is of no benefit whatever to the owners of either ship or cargo. There is nothing to shew that the statutes were intended to impart any new meaning to the policy of marine insurance, which existed long before the legislation in favour of salvors of life. If the defendants' contention were right, the underwriter on goods might have to bear part of the risk of the loss of the ship; for, if the ship were totally lost and the cargo were saved, the whole of the life salvage would under the statutes fall upon the cargo.

I see no ground for adding the liabilities created by the statute to those which are covered by the ordinary policy of insurance, and I give judgment for the plaintiff for the full amount claimed.

Judgment for the plaintiff.

W. A.

The defendants appealed.

May 14. *Joseph Walton, Q.C.*, and *Carver*, for the defendants. Salvage in respect of property insured is recoverable under a Lloyd's policy, though not expressly mentioned in it. If that is so by virtue of the "sue and labour" clause, it must be admitted that the defendants' contention in this case must fail. In the later editions of Arnould on Marine Insurance, the view taken by the editor is that ordinary salvage is recoverable under the "sue and labour" clause: see 5th ed. vol. 2, p. 778; but the correctness of his view was negatived by Lord Blackburn in *Aitchison* v. *Lohre*. (1) In the earlier editions of Arnould on Marine Insurance the liability of the underwriter for salvage in respect of property appears to be put upon a general principle that the assured may recover from the underwriters in respect of any charge occasioned by perils insured against which by the law of the land or the law maritime is

(1) 4 App. Cas. 755, at p. 764.

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imposed on the property insured. In the 1st ed. vol. 2, p. 846, the learned author says: "the liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land or the general law maritime a direct and immediate consequence of the perils against which he does insure." Life salvage was first created by 9 & 10 Vict. c. 99, s. 19, in 1846, and now depends upon the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 544. By s. 552 of that Act a lien on the ship is given for it. It is contended, therefore, that it comes within the same principle as salvage in respect of property, as being a charge occasioned by perils of the sea which is by law imposed upon the ship, and is consequently recoverable under the ordinary form of Lloyd's policy.

[They cited *The Renpor* (1); *Dent* v. *Smith*. (2)]

Sir Walter Phillimore, and *L. Batten*, for the plaintiff. There is no such general rule as the defendants contend for with regard to the liability of the underwriters in respect of charges for which there is a lien on the ship. Their contention is contrary to what is laid down in *De Vaux* v. *Salvador*. (3) The effect of what was said in *Aitchison* v. *Lohre* (4) by Lord Blackburn was not that ordinary salvage in respect of property is recoverable on a Lloyd's policy by reason of any such rule as suggested, but that it is treated as a loss directly occasioned to the subject-matter of insurance by a peril insured against, it being the cost of avoiding such a peril. Life salvage is not within the statement of the law in the early editions of Arnould on Marine Insurance. It is not analogous to salvage in respect of property. Such salvage is for the benefit of the shipowner or cargo-owner, and a lien is therefore given by the law maritime upon the property saved in respect of it. The saving of life is of no benefit to the shipowner or cargo-owner or the underwriters. The lien in respect of life salvage is not imposed by the law maritime or upon that which is saved. Life salvage is not a charge in respect of the saving of the subject-matter of insurance from a peril insured against. It is a charge

(1) 8 P. D. 115.
(2) L. R. 4 Q. B. 414.
(3) 4 A. & E. 420, at p. 431.
(4) 4 App. Cas. 755.

imposed upon the shipowner or cargo-owner by statute which, like the loss in *De Vaux* v. *Salvador* (1), "can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular State, which was rendered inevitable by perils insured against." Life salvage first came into existence in 1846 under 9 & 10 Vict. c. 99, s. 19, and, therefore, could not have been in the contemplation of those who framed the ordinary form of Lloyd's policy which existed much earlier.

[They also cited *Power* v. *Whitmore* (2); *Robertson* v. *Ewer*. (3)]

Joseph Walton, Q.C., in reply. The ground of the decision in *De Vaux* v. *Salvador* (1) was that there was no loss by peril of the sea.

LORD ESHER M.R. In this case, the plaintiff's ship being in peril, another ship, called the *Normannia*, came to her assistance and rescued the captain and crew of the plaintiff's ship, leaving the ship herself derelict. Subsequently a third ship, called the *Merrimac*, finding her derelict, brought her into port. Under these circumstances there was what has been called a life salvage by the captain and crew of the *Normannia*, they being salvors of life and of nothing else. A claim in respect of that salvage was made in the Admiralty Court. Such a claim could not have been maintained under the maritime law or the common law of England, but was only maintainable by virtue of a statute, which provides that, when services have been rendered in saving life from a ship at sea and the ship has been saved, salvage shall be payable to the salvors in respect of the saving of life, and, by way of procedure, the ship may be detained in order to realize the amount of the salvage which may be awarded. In this case that procedure was adopted, and the Court awarded a certain sum to be paid by the plaintiff in respect of the statutory liability so imposed upon him. The plaintiff, having paid that amount, seeks to recover it from the defendants under their rules. There is no doubt that he is

(1) 4 A. & E. 420.

(2) 4 M. & S. 141.

(3) 1 T. R. 127.

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Lord Esher M.R.

entitled to do so under the terms of rule 13, unless the case comes within rule 18, which provides that no contribution or payment shall be made in respect of any loss which is capable of being insured against by the usual form of Lloyd's policy. Therefore the sole question in this case is whether the plaintiff could have recovered for the loss sustained by him on a policy in that form. The ordinary form of Lloyd's policy has substantially been in existence for more than a hundred years, though there may have been some additions to and alterations of it; and, subject thereto, it must be construed, I think, as bearing the same meaning as it bore at the time when it was introduced. The question is whether it can be construed as applicable to such a loss as has occurred to the plaintiff in this case—namely, a loss by reason of the statutory liability imposed upon the shipowner to pay salvage for the saving of the lives of persons on board his ship when she was in peril at sea. It is quite clear that prior to 1846 no such liability could have been the subject-matter of insurance, nor any such loss claimed for, under the ordinary form of Lloyd's policy. It is true that, where there had been salvage of a ship, and at the same time and by the same persons salvage of the lives of persons on board the ship, the Court of Admiralty, in the first instance perhaps rather arbitrarily, increased the amount payable in respect of the salvage of the ship, but it never awarded salvage in respect of the saving of life alone; and consequently there could be no question of recovering in respect of such salvage under a Lloyd's policy. What, then, is the effect of the statutory enactments on the matter? The statute no doubt gives a reward in the nature of salvage for saving life at sea under certain circumstances, and gives a procedure for recovery of it similar to that applicable in the case of ordinary salvage services to a ship; but it does not make or assume to make that reward one for salvage services to the ship. The reward given by the statute for saving life is independent of any salvage services rendered in respect of property, whereas under the maritime law salvors never could recover anything in respect of life saved unless they had also rendered salvage services in respect of property. Although it is called salvage, the reward given by the statute is not like

ordinary salvage. It is a new head of salvage altogether. The statute can have no effect, as it appears to me, on the meaning of the ordinary form of Lloyd's policy, because the life salvage for which it provides is a new head of salvage altogether which was not in existence when the form first came into use, and could not have been in the contemplation of its framers. For these reasons I think that the loss for which the plaintiff claims is not within the meaning, as it is not within the terms, of an ordinary Lloyd's policy, and therefore is not within rule 18 of the defendants' rules. In my opinion, the judgment of Mathew J. was right and should be affirmed.

A. L. SMITH L.J. I am of the same opinion. I have no doubt that the judgment of Mathew J. is right. The question is whether a policy in the ordinary form of a Lloyd's policy covers a life salvage which the plaintiff has become liable to pay under the statute. We have heard a long argument on the subject, but not a single case has been cited which has any direct bearing on the point. It is remarkable that, though the ordinary form of Lloyd's policy has been in existence for more than a hundred years, as appears from the schedule to 35 Geo. 3, c. 63, and the statutory liability to payment of life salvage has existed since 1846, there is apparently not a single case in the books in which it has ever been suggested that such a claim as this could be recovered under an ordinary Lloyd's policy. It was very ingeniously contended by the defendants' counsel that this life salvage, being occasioned by sea perils and being by law charged upon the ship, was a loss within the meaning of a Lloyd's policy like ordinary salvage. It is, however, significant that by rule 13 the defendants undertook liability for life salvage. Yet, though they expressly did this, the argument of their counsel is that in reality they did nothing of the sort. There is not in my judgment any analogy between salvage in respect of salvage services rendered to the ship and life salvage which is the creation of statute. I can see no answer to the reasoning of the judgment of the learned judge in the Court below. It is not necessary in this case to discuss over again *Aitchison* v. *Lohre*. (1)

(1) 4 App. Cas. 755.

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RIGBY L.J. I am of the same opinion. If the defendants' contention were supported, it would be something very much like turning an ordinary Lloyd's policy on a ship into an insurance on the master and crew. What is the argument for the defendants? Starting from the undoubted fact that in the case of ordinary salvage of ship the underwriter is liable, it seeks on very insufficient grounds, as it seems to me, to deduce therefrom a general proposition which, if true, would no doubt cover this case. It was suggested that ordinary salvage was payable by underwriters, because it was a charge on the ship occasioned by sea perils. I am not satisfied that that is a true account of the matter. The insurance in a Lloyd's policy is against loss or damage to the ship; and it appears to me probable that this liability of underwriters in respect of ordinary salvage arose not by reason of its being deducible from the actual terms of the policy, as to which I feel considerable difficulty, but by reason of the fact that the underwriters thought that it was really for their own interest to acquiesce in it. It appears to me impossible from that single instance to deduce the general proposition for which the defendants' counsel contended, namely that, wherever sea perils lead to a charge upon the ship, the underwriter of a Lloyd's policy is liable. There are, no doubt, some expressions in Arnould on Marine Insurance which are favourable to the argument for the defendants; but I feel sure that the learned author never intended to lay down such an extensive proposition as that contended for. I find no authority which leads me to suppose that such a general proposition is established as part of the law of marine insurance.

Appeal dismissed.

Solicitors for plaintiff: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

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April 22–24; *May* 16.

LONDON COUNTY COUNCIL, APPELLANTS; CHURCHWARDENS AND OVERSEERS OF LAMBETH, RESPONDENTS.

Poor-rate—Rateable Value—Beneficial Occupation—London County Council—Public Park—London Council (General Powers) Act, 1890 (53 & 54 *Vict. c. ccxliii.*), *ss.* 4, 5.

The appellants, a county council upon whom was not imposed any duty to provide a park for the use of the public, were empowered by statute to acquire by purchase and accordingly acquired certain hereditaments, which were by the terms of the statute, if acquired by the appellants, to be held and maintained by them as a park for the perpetual use thereof by the public for exercise and recreation. The necessary expenses of maintaining the park exceeded any sums of money which the appellants could derive from licences for the supply of refreshments therein, or for grazing rights, or otherwise. The appellants having been rated to the relief of the poor in respect of the park:—

Held (reversing the judgment of a Divisional Court) that, the occupation of the park not having any net annual value, the rate could not be supported.

APPEAL from the judgment of a Divisional Court (Pollock B. and Wright J.) on a special case stated on appeal to quarter sessions against a poor-rate.

The special case is set out in the report of the case in the Court below. (1) For the purposes of this report the facts may be briefly summarized as follows. The appellants, the London County Council, had been rated as occupiers of certain hereditaments and premises known as Brockwell Park, which had been acquired by them under the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), upon a rateable value of 359*l.* By s. 4 of that Act it was in substance provided that the council might purchase Brockwell Park, and, when they had acquired it, they should hold the same and every part thereof as a park, and should lay out, maintain, and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation. The necessary expenses of maintaining

(1) [1895] 2 Q. B. 511.

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the park as a whole with the buildings on it, for the purposes of the Act, far exceeded any sums of money which were or could be derived from licences for the supply of refreshments in the park, or for grazing rights, or otherwise. It was found in the case that, if the hereditaments assessed in the rate had remained in the same state of use and occupation in which they were prior to the passing of the Act, the rateable value thereof would have been sufficient to support the figures set out in the rate; and that, if the appellants had had a duty to provide an open space for the public in the locality, and, for the purpose of carrying out that duty, had had the power and the wish, instead of purchasing the park, to take it as lessees or tenants, and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures in the rate. The Divisional Court held that the appellants were liable to be rated to the relief of the poor as beneficial occupiers of Brockwell Park, and ordered the case to be remitted in order that the beneficial value might be found, subject to certain limitations stated in the judgment. (1)

April 22, 23, 24. *Bosanquet, Q.C.*, and *Avory*, for the appellants. Admitting the park to be a rateable hereditament in one sense, and that the appellants must be considered as possible tenants of it according to the decision in *Reg.* v. *School Board for London* (2), it is contended that the rateable value is nil, for the hypothetical tenant must in this case be considered as occupying the park subject to the restrictions imposed by the statute; and it appears from the case that the expenses of keeping up the park imposed by the statute on the appellants largely exceed any profits which they can make. Therefore no tenant would give more than a nominal rent. It is found by the case no doubt that, if the appellants had a duty to provide an open space for the public in that locality, and for that purpose wished to rent the park, they would have to pay a rent for the same sufficient to support the figures in the rate. But no such duty is imposed by statute or otherwise upon the appellants, and the case is in that respect distinguishable from cases

(1) [1895] 2 Q. B. 511, at p. 520. (2) 17 Q. B. D. 738.

such as *Reg.* v. *School Board for London* (1), *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2), and *London County Council* v. *Churchwardens, &c., of Erith.* (3) It is distinctly laid down in *Jones* v. *Mersey Docks and Harbour Board* (4) that the rate must be upon value to the occupier, though there need not be any pecuniary profit to him. If the occupying owners were under a duty to provide an open space for the public, the annual value of the park to them might be the rent they would have to pay for it as yearly tenants. It is not sufficient, however, that the premises should be of value to the public, if they cannot be considered as of any value to any occupier. The cases of *Hare* v. *Overseers of Putney* (5) and *Mayor of Lincoln* v. *Holmes Common* (6) are authorities to shew that the rate in the present case cannot be sustained. In both those cases the hereditament, though valuable, in the one case to the public, in the other to the freemen of the borough, was of no value to the occupiers, and therefore they were held not rateable in respect of it.

[They also cited *Mayor, &c., of Worcester* v. *Assessment Committee of Droitwich Union* (7); *Owens College* v. *Overseers of Chorlton-upon-Medlock* (8); *Guardians of Sculcoates Union* v. *Dock Company at Kingston-upon-Hull.* (9)]

Lawson Walton, Q.C., and *Lewis Coward*, for the respondents. The hypothetical tenant ought not to be considered as occupying the land subject to the statutory restrictions. The result of the authorities, as summed up in the House of Lords in *London County Council* v. *Churchwardens, &c., of Erith* (3), is that the test of beneficial occupation is not whether the occupier can make any profit, but whether the occupation is of a valuable subject-matter. The appellants have a "beneficial" occupation in the sense of the words applicable to the subject of rating. If the occupation is of a hereditament which is of value to somebody, it is immaterial whether the occupier derives

(1) 17 Q. B. D. 738.
(2) 24 Q. B. D. 197.
(3) [1893] A. C. 562.
(4) 11 H. L. C. 443.
(5) 7 Q. B. D. 223.
(6) L. R. 2 Q. B. 482.
(7) 2 Ex. D. 49.
(8) 18 Q. B. D. 403.
(9) [1895] A. C. 136.

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or can derive advantage or profit. In the cases of *Reg.* v. *School Board for London* (1), *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2), and *London County Council* v. *Churchwardens, &c., of Erith* (3), there could be no profit or advantage to the occupiers of the hereditaments rated, and yet the rate was sustained. The hereditaments were in those cases devoted to public purposes, and their only value was to the public. In this case the appellants are a public body with functions having relation to matters of public health. The cases shew that, when such a body acquires for the purposes of its functions a hereditament, in itself valuable, it must be considered as a possible tenant of the hereditament, and as having a beneficial occupation, and is therefore rateable to a substantial amount in respect of that occupation. It does not constitute a substantial distinction that, instead of a duty to provide a park being imposed upon the appellants by the general Act under which they came into existence, they had to obtain a special enactment authorizing them to acquire this park, and making it their duty to hold it for the public benefit when acquired. The value for assessment may not be the value which the premises had before they became a public park, or the rent which would have to be paid if they were rented, but it should be more than nominal. It seems an extraordinary contention to say that premises for which the appellants have been willing to give 60,000*l.* are of no annual value to them. It is contended that, if the appellants are not liable to the rate imposed on the hereditaments as a whole, they are liable to separate assessments in respect of the old mansion-house, lodge, and cottage mentioned in paragraph 1 of the case, as being hereditaments beneficially occupied by them, notwithstanding the statutory restrictions.

[They cited *West Bromwich School Board* v. *Overseers of West Bromwich.* (4)]

Bosanquet, Q.C., in reply.

Cur. adv. vult.

(1) 17 Q. B. D. 738.
(2) 24 Q. B. D. 197.
(3) [1893] A. C. 562.
(4) 13 Q. B. D. 929.

May 16. The following judgment was read by

A. L. SMITH L.J. The main question raised by this special case is what upon the facts stated, as a matter of law, was the rateable value of Brockwell Park, which had in the year 1891 become one of the public parks of London, when it was rated to the relief of the poor by the overseers of the parish of Lambeth upon April 7, 1894. Was its rateable value then the same as it had been prior to its becoming a public park, or had its rateable value been thus reduced to a nominal or what other sum? The overseers have assessed the park at its rateable value prior to its having become a public park. Their counsel did not, however, at the Bar contend for this, or for anything like it; but he argued that this Court should hold that the facts of the special case shewed that, as a matter of law, its rateable value was other than nominal, or, as he said, something in excess of nil.

The material facts as they appear upon the case are these. Prior to the year 1890, when the London Council (General Powers) Act (53 & 54 Vict. c. ccxliii.) was passed, Brockwell Park belonged to a private owner, and consisted of seventy-eight acres of land with a mansion-house, lodge, and cottage thereon. It was then rated to the relief of the poor at a net annual rateable value of 359*l.*, and it is not disputed that this was then its rateable value. By the Act of 1890, s. 4, the Legislature empowered the London County Council, if they thought fit, to purchase Brockwell Park, and it enacted, "that when the council shall have acquired the same they shall . . . . lay out, maintain, and preserve the same and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation." In the year 1891 the London County Council exercised the option so given to them, and subscribed towards its purchase 60,000*l.*, the residue of the purchase-money, 57,000*l.*, being obtained from other sources. The case finds that: "The necessary expenses of maintaining the park as a whole with the buildings on it, for the purposes of the Act, far exceed any sums of money which are or could be derived from licences for refreshments or for grazing rights or otherwise. The actual expenses exceed 2000*l.* a year": in other words, when the rate was

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made in April, 1894, the London County Council were necessarily heavy pecuniary annual losers by reason of the obligation imposed upon them by the statute to maintain the park as a park for the perpetual use thereof by the public for exercise and recreation. The London County Council were not empowered to let the park or any part of it, or to use any part of it in any other way than as a public park for the recreation of the public for ever. It never can be abandoned as a public park, but must remain a public park for ever, kept up at the expense of the London County Council. In considering whether a hereditament is a rateable hereditament or not, in my judgment in the first place it must be determined whether its occupation is capable of value in any person's hands whatsoever. If yes, then it is a rateable hereditament; aliter if it is not. The counsel who appeared for the London County Council very properly, in my judgment, admitted that Brockwell Park, though its rent-producing capacity was fettered as above mentioned, was a rateable hereditament; and I therefore need not embark upon the theory of land being struck with sterility in any and everybody's hands; for the question before us is whether, taking the conditions under which the London County Council were by the statute of 1890 bound for ever to occupy the park, there are findings in this case which render the rateable value of that occupation other than nominal.

Now, as regards the law to be applied to the rating to the relief of the poor of a rateable hereditament under the statute of Elizabeth, there are three well known legal landmarks. First, the Parochial Assessment Act (6 & 7 Will. 4, c. 96), which was passed in the year 1836, by which was enacted the rule whereby the rateable value of the occupancy of a hereditament is to be ascertained; secondly, the case of *Jones* v. *Mersey Docks and Harbour Board* (1) in the year 1864 in the House of Lords, which laid down how this rule was to be applied; and, thirdly, the case of *Reg.* v. *School Board for London* (2) in this Court in the year 1886, in which it was for the first time held that the occupying owner was to be taken

(1) 11 H. L. C. 443, at p. 461. (2) 17 Q. B. D. 738.

into account as a possible hypothetical tenant when arriving at the rateable value of a hereditament.

Lord Blackburn (then Blackburn J.), in delivering the opinion of the majority of the judges in the House of Lords in the case of *Jones* v. *Mersey Docks and Harbour Board* (1), thus laid down the rule. He said the Parochial Assessment Act has enacted "that no rate shall be valid unless made 'upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.' In order, therefore, that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property; for, if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate." This rule was adopted by the House, and is the undoubted law upon the subject. The Lord Chancellor (Lord Westbury) said: "having regard to the Parochial Assessment Act (6 & 7 Will. 4, c. 96), it may be said in answer that occupation to be rateable must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings." This rule has been ever since acted upon down to the present time. I will take one instance from amongst the

(1) 11 H. L. C. 443.

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many by way of example. In the case of *Mayor of Liverpool* v. *Overseers of Wavertree* (1), Blackburn J., in delivering judgment, said: "The whole question turns on the rule given by the Parochial Assessment Act, which says the occupier is rateable at what a tenant from year to year will give as the rent, who takes the land subject to the same restrictions as those under which the appellants hold it. Now the tenant would only give such a rent as the restrictions imposed by statute would enable him to earn; and the rateable value is to be based upon that rent." This is the rule, and it is settled and plain; it is in its application to different sets of facts that difficulty has arisen, as will be seen from the many cases in the LAW REPORTS upon the subject.

From the year 1836 down to the year 1886, the hypothetical tenant was assumed to be a person other than the occupying owner of the hereditament sought to be rated, and, had the law remained so until now, I cannot doubt that the present contention of the respondents would have been hopelessly untenable; for it is plain enough, and indeed it is admitted by their counsel, that no hypothetical tenant (leaving out of consideration the occupying owner, the London County Council, as a possible hypothetical tenant) would in April, 1894, have given a farthing of rent, to use Lord Blackburn's expression in *Mayor of Lincoln* v. *Holmes Common* (2), for Brockwell Park, subject to the restrictions and prohibitions imposed upon the occupancy of the park by the Legislature in 1890. In the year 1886, however, matters changed, and the case of *Reg.* v. *School Board for London* (3) came up for determination in this Court. The question was whether the school board, who were occupying owners of the premises sought to be rated, were to be excluded when inquiring what rent a hypothetical tenant would have been willing to give for the school premises, and it was held that the school board had the duty imposed upon them by the Legislature to provide school premises for educational purposes, and might, if they had not purchased the premises sought to be rated, have been induced

(1) 2 Ex. D. 55. (2) L. R. 2 Q. B. 482.
(3) 17 Q. B. D. 738.

or forced to become tenants of them, and, as they had power to rent premises, they were not to be excluded when considering the possible hypothetical tenant. Then came the case of *Owens College* v. *Overseers of Chorlton-upon-Medlock* (1), before the late Stephen J. and me in the Divisional Court, when we held, following the case of *Reg.* v. *School Board for London* (2), that, in considering what rent the hypothetical tenant would be likely to give, the occupying owner, i.e. Owens College, was to be taken into consideration. I find from the report of this case in the *Law Times* Reports (1) that it was admitted before us that a solvent tenant would have given such a rent as tenant from year to year as would support a rateable value of either 1000*l.* or 1300*l.*, the respondents' contention being that the rateable value of the college should be assessed upon the calculation of 4 per cent. upon the cost price of erecting the buildings, which brought out the rateable value of 3285*l.*, which was what the college appealed against. This last argument we discarded, and I think rightly so; and we followed *Reg.* v. *School Board for London* (2), and included the occupying owner as a possible tenant, and upheld the rate at 1300*l.* Upon appeal, this Court held (3) that, although the trustees of the college had a duty imposed upon them by law of maintaining a college for educational purposes, yet, inasmuch as it was by law incapacitated from renting the premises sought to be rated, it was to be excluded from consideration as a possible hypothetical tenant.

In the year 1889, in the case of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (4), the principle laid down in *Reg.* v. *School Board for London* (2) was acted upon in this Court, it being held that the mayor and corporation of Burton-upon-Trent, who were occupying owners, had a duty imposed upon them to dispose of the sewage, and were competent to have become tenants for that purpose of the premises sought to be rated. They were therefore held to be in the category of possible hypothetical tenants; and this case was distinguished from the case of *Owens College* v. *Overseers*

(1) 55 L. T. 737.
(2) 17 Q. B. D. 738.
(3) 18 Q. B. D. 403.
(4) 24 Q. B. D. 197, at p. 207.

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of Chorlton-upon-Medlock (1) upon the ground that the mayor and corporation were competent possible hypothetical tenants, whereas in the case of *Owens College* v. *Overseers of Chorlton-upon-Medlock* (1) the college was not.

So matters, so far as material, rested until the year 1893, when these three last-mentioned cases came under review in the House of Lords in the case of *London County Council* v. *Churchwardens, &c., of Erith.* (2) It was there held that the cases of *Reg.* v. *School Board for London* (3) and of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (4), in which it had been held that the occupying owner was to be taken into account as a possible hypothetical tenant, were rightly decided, but that the case of *Owens College* v. *Overseers of Chorlton-upon-Medlock* (1), in which he was excluded, was not rightly decided. Lord Herschell L.C. (5) gives his reasons for this conclusion as follows: "An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay, may be taken into account when inquiring what is its annual value—that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although, as a matter of fact, he could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so." This opinion of Lord Herschell L.C. was approved of by the House.

There can be at the present day no doubt whatever that the London County Council, as occupying owners of Brockwell Park, are to be taken into consideration as possible hypothetical tenants; and this brings me to the point, which in my judgment is the real point, whether the facts stated in

(1) 18 Q. B. D. 403.
(2) [1893] A. C. 562, at pp. 590–596.
(3) 17 Q. B. D. 738.
(4) 24 Q. B. D. 197.
(5) [1893] A. C. at p. 596.

the special case shew as a matter of law that the London County Council would, as hypothetical tenants, have been willing upon April 7, 1894, to have given a rent in excess of what any other hypothetical tenant would have given, which it is not contended would have been in excess of a nominal rent.

The London County Council owed no duty whatever to any one to provide a park for the public at Brockwell or anywhere else, though their doing so was no doubt prompted by philanthropic purposes for the benefit of the public whose representatives they were; but benefit to the public is not a value which can be taken into consideration when ascertaining what rent a hypothetical tenant would give for a hereditament. The question is what value is the hereditament to the hypothetical tenant. Blackburn J. in *Jones* v. *Mersey Docks and Harbour Board* (1) pointed this out. He said: "The rate is to be withheld" (this must be a misprint for either imposed or upheld) "not in respect of the value of the benefit conferred on the public, or on that portion of it which uses the dock, but is to be imposed on the occupiers of the docks in respect of the value to them" (i.e. the dock company) "derived from the payments taken for that use." In the case of *Hare* v. *Overseers of Putney* (2) in this Court this statement of the law, as it appears to me, was adopted. In that case the Metropolitan Board of Works, pursuant to statute, purchased Putney Bridge from its owners, took off the tolls, and threw it open to the public toll free. The occupation of the bridge thereafter never was of value to the Metropolitan Board of Works, though it undoubtedly was of the greatest value to the public whose representatives the Metropolitan Board of Works were, and it was held that this fact did not support the rate made upon the Metropolitan Board of Works. There is no finding in this case that the London County Council would give a farthing of rent for Brockwell Park. All that is found is this (paragraph 21): "If the appellants had had a duty to provide an open space for the public in the locality, and for the purpose of carrying out that duty had had the power and wish, instead of purchasing

(1) 11 H. L. C. 443, at p. 478. (2) 7 Q. B. D. 223.

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the said park, to take it as lessees and tenants, and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures of the rate." On the other hand, it is found that the London County Council must necessarily be annual heavy pecuniary losers by reason of being bound by statute to keep up the park for ever for the recreation of the public. Then how, as a matter of law, is it to be said that the London County Council would be willing to give as hypothetical tenants more than a nominal rent? In all the cases cited, in which an occupying owner has been brought within the category of hypothetical tenant as being willing to give more rent than any other hypothetical tenant, there has been not only the duty imposed upon such owner of providing what the Legislature has required shall be provided by him, but, except in the case of *Reg.* v. *School Board for London* (1), there has been a specific finding that, if he had not been occupying owner, he would have given a rent sufficient to support the rate. In *Reg.* v. *School Board for London* (1) there was the duty to provide a school-house, and the sole point decided by this Court (and the judgments are explicit as to this) was that the occupying owner was to be considered as a possible hypothetical tenant, and nothing more. In the case of *Owens College* v. *Overseers of Chorlton-upon-Medlock* (2) there was the duty to provide premises for educational purposes, and in that case, as before stated, the argument proceeded upon the admission that the college as hypothetical tenant would give a rent sufficient to uphold a rateable value of either 1000*l.* or 1300*l.*, although the college could not be worked at a profit. There was a similar duty in the case of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (3), namely, a duty to provide a sewage farm to deal with the sewage, and in that case there was also the finding that, although the farm and pumping station as part of the sewage system could not be worked at a profit, if the farm and pumping station belonged to a private owner, the appellants would hire them at a rent sufficiently

(1) 17 Q. B. D. 738. (2) 18 Q. B. D. 403.
(3) 24 Q. B. D. 197.

high to maintain the rate; and lastly, in the case of *London County Council* v. *Churchwardens, &c., of Erith* (1), in the House of Lords, Lord Herschell (1) commences his speech, and it is the foundation of his opinion, by pointing out that it was found in the special case (paragraph 10) that the London County Council, if they had not been occupying owners of the outfall works and pumping station sought to be rated, would have been willing to pay as yearly tenants a rent for the same sufficient to support the rate. This same finding will be found in all the three cases which were then argued together in the House of Lords.

Now, a great deal has been said in this Court, both in this case and in the case of *Hull Docks Co.* v. *Guardians of Sculcoates Union* (2), as to what the House of Lords decided in the case of *London County Council* v. *Churchwardens, &c., of Erith* (1), and I desire to state what in my judgment the House of Lords has laid down therein. It is this: first it reaffirmed what had been affirmed in the year 1864 by the House in *Jones* v. *Mersey Docks and Harbour Board* (3), namely, that to render a hereditament rateable its occupation must be of value to some one, and that it was not essential to rateability that a particular occupier of the land should be able to make a pecuniary profit out of it. Secondly, it held that the occupying owner was to be taken into account as a possible hypothetical tenant, when ascertaining what rent a hypothetical tenant would give for the premises about to be rated, even although the occupying owner was prohibited by statute from renting the premises. Thirdly, it left the rule as to the method of ascertaining the rateable value precisely where it was before, and as regards the case of an occupying owner being taken as a hypothetical tenant Lord Herschell says (4): "The whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises."

The question as to what rent the hypothetical tenant, whether

(1) [1893] A. C. 562, 579.
(2) [1894] 2 Q. B. 69.
(3) 11 H. L. C. 443.
(4) [1893] A. C. 562, at p. 593.

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occupying owner or not, would be willing to give as tenant from year to year, over and above the expenditure to command the rent, is necessarily one of fact. The argument that the House of Lords has determined in the case of *London County Council* v. *Churchwardens, &c., of Erith* (1) that an occupying owner must in every case be willing to give more than a nominal rent is in my judgment wholly untenable. The House of Lords decided no such thing, and the subsequent case of *Guardians of Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (2) in the House of Lords shews that this is so. To state it shortly, it decided that, it having been found as a fact that, had the London County Council not been occupying owners of the works sought to be rated, they would have been willing to pay a yearly rent for the same sufficient to support the rate, applying the ordinary well known rule, this rent was the basis upon which to ascertain the rateable value of the works, even although the London County Council were by law prohibited from renting the premises; and that it was nihil ad rem to shew in answer to such a finding that no profit could be made out of the occupying of the premises by the London County Council. Now, as before stated, there is no finding in this case that the London County Council would have been willing to have paid any rent other than nominal, or indeed any rent at all; and I must point out that this is very remarkable and worthy of notice, seeing what the special findings in the case of *London County Council* v. *Churchwardens, &c., of Erith* (1) and other cases argued therewith, and in the case of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (3), had been, and which must have been before the advisers of the respondents when this special case was settled. It is obvious that the respondents have been unable to obtain any such finding, and have been obliged to content themselves with the finding that, if the London County Council had had a duty to provide an open space for the public in the locality (which they had not), they would have had to pay a rent for the same sufficient to support the figures in the

(1) [1893] A. C. 562. (2) [1895] A. C. 136.
(3) 24 Q. B. D. 197.

rate—a very different finding indeed from that upon which the prior cases were adjudicated. There being no such finding, how can this Court, as a matter of law, hold that the London County Council would have been willing to give anything in excess of a nominal rent for the occupying of the park, when upon the facts found they must for ever be large annual pecuniary losers by having to keep up the park? The point taken in argument that, because the London County Council had given towards the purchase of the park 60,000*l.*, that shews, as a matter of law, that they would have been willing to give more than a nominal rent for the park, is in my judgment unsound. Take for instance the case, now unfortunately in some counties of England by no means of uncommon occurrence, of an occupying owner having in years gone by purchased an agricultural farm which of late years can only be worked at a dead out of pocket loss, and for which no tenant can be found to give any rent at all over and above the expenditure necessary to command the rent. Is it to be said, as a matter of law, that the occupying owner, because he had sunk his money in the farm, would give more than a nominal rent for that farm at the present time? Again, how can it be said, as a matter of law, that, either from philanthropic motives or in order to ingratiate themselves with their constituents, the London County Council would have given more than a nominal rent for Brockwell Park, even if this could legitimately be considered? It appears to me impossible so to hold; and yet this is what we are in reality asked to do upon this special case by the respondents. I cannot come to the conclusion upon the facts stated that the London County Council would have been willing, as a matter of law, on April 7, 1894, to have given other than a nominal rent; and I therefore disagree with the Divisional Court, which held that the rateable value of Brockwell Park upon the facts stated must have been, as a matter of law, something in excess of nil; and I would point out that it is only with a question of law arising out of facts that either the Divisional Court or this Court has jurisdiction to deal. I may perhaps add that upon the facts as stated I am not at all surprised that the respondents have been unable to obtain

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a finding as in the *Erith Case* (1) and other cases above mentioned.

A subsidiary point was taken by the respondents that certain parts of the park—for instance, that part of the old mansion-house which is now used for refreshments for the public, and the other part of the old mansion which was not occupied at all, and also the lodge and cottage—were subject-matters for separate assessments distinct from the park itself, and had a rateable value of their own. The Divisional Court held that this was not so, and I agree with them. The obligation imposed upon the London County Council by the Act of 1890 was to lay out, maintain, and preserve Brockwell Park, and every part of it, as a park for the perpetual use thereof by the public for exercise and recreation. As before stated, the London County Council could let off no part of it. The Legislature enacted that if the London County Council purchased Brockwell Park, they should take to it as a whole, and for ever maintain it as a whole, and that the whole should be used for a public purpose for ever. This being so, in my judgment it must be rated as a whole, as one entity, and in one assessment; and consequently this small point will not avail the respondents. This appeal must, therefore, for the reasons above, be allowed with costs.

The following judgment was read by

RIGBY L.J. Ever since the passing of the statute of Elizabeth, the measure of rateability of an occupier in respect of property has been the value of the property for occupation. This may be said to be the fundamental principle of the Act. The Parochial Assessment Act (which differs in no material respect from the Valuation (Metropolis) Act, 1869) points out with precision how the proper figure is to be ascertained. The assessment is to be on the net annual value. But net annual value is explained to be the excess (if any) over expenditure necessary to command the rent of the rent which might reasonably be expected to be obtained from year to year from a

(1) [1893] A. C. 562.

tenant, subject to usual tenant's rates and taxes and tithe commutation rent-charge, if any.

The inquiries, therefore, always are: first, what rent might reasonably be expected to be obtained; secondly, what average expenditure would be required to command that rent. If the sum ascertained in answer to the first inquiry is either nothing at all, or not in excess of the amount of expenditure shewn by the answer to the second inquiry, the property has no rateable value.

The rent which might reasonably be expected is to be ascertained by taking into consideration every person to whom the property can have an occupation value, including the owner himself, if the property would have to him a special occupation value. Of course, from the nature of the case the owner cannot be tenant; but, for the purpose of ascertaining the net annual value or rent, it is clear on the decided cases that he must be treated as a possible tenant for the purpose of calculation only.

What I have called the fundamental principle of the Act is clearly pointed out and made the foundation of the judgment in the case of *Jones* v. *Mersey Docks and Harbour Board.* (1) In that case also it is laid down that it is not value in the sense of advantage to the public which has to be taken into account, but value to the occupier. In the cases of *Reg.* v. *School Board for London* (2), *Owens College* v. *Overseers of Chorlton-upon-Medlock* (3), *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (4), and *London County Council* v. *Churchwardens, &c., of Erith* (5), and other cases dealt with by the House of Lords at the same time with the case of *London County Council* v. *Churchwardens, &c., of Erith* (5), there was no doubt that the school buildings, the college buildings, and the sewage works were of annual value to the occupying owners. In each case the owners, if they had not already acquired the property in respect of which they were sought to be rated, would have had to acquire other property at a great expense, and the

(1) 11 H. L. C. 443.
(2) 17 Q. B. D. 738.
(3) 18 Q. B. D. 403.
(4) 24 Q. B. D. 197.
(5) [1893] A. C. 562.

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Rigby L.J.

net annual value to them of the property actually acquired was not less than the rent (less proper outgoings) which it would have been worth their while to pay for the property if they had not been owners. In each case also the property, by reason of its special adaptability for the purposes of the occupying owners, was obviously of greater value to the occupying owners than to any one else, and the question really was whether that greater value was to be taken into account in fixing the hypothetical rent which, according to the Parochial Assessment Act, was to govern the measure of rateability. No such question arises in the present case. It is admitted that, if the land in question were or could be of any net annual value to the London County Council, or to any one else as occupiers, that value must be taken into account. But it is denied that the land is of any net annual value for occupation, either to the London County Council or to any one else. In the existing state of the statute law as to this particular property, that is clearly made out, since no conceivable income which could be obtained from the property, so long as it remains devoted to the public use as a park, can exceed the necessary outgoings for its maintenance which the Act of Parliament imposes. It cannot even be said that the possession of the park relieves the county council from expenditure which they would have otherwise to incur, since they are under no duty to provide a park for the public use, and have no power, even if they had the wish, to do so. The advantage to the public of having the land kept as a park cannot be taken into account.

It has, however, been argued that, although by statute the land is devoted in perpetuity as a park for the recreation of the public, it ought for the purpose of ascertaining its annual value to be treated as though it were not so devoted; and it is said truly that on this assumption it would have an undoubted and considerable annual value to an occupier. Another way of stating the argument is that, in ascertaining the value of land for rating purposes, regard should be had only to unproductiveness arising from natural causes, and not from legal restrictions. This argument appears equally opposed to principle and authority. It is the real net annual value which is always

to be the foundation of the assessment. The real net annual value to an occupying owner has, as above appears, to be arrived at by supposing a tenancy which cannot at law exist for the purpose of fixing the hypothetical rent, which by statute is made the measure of net annual value. But the supposition of a tenancy is only for the purpose of calculation, and it is the real net annual value to the occupying owner which is arrived at. The argument now being dealt with attributes to the property a fictitious annual value, having no relation whatever to its real annual value. There is nothing in the statute of Elizabeth or in any decided case to justify this. Authority as well as principle is opposed to it. The Putney Bridge case (*Hare* v. *Overseers of Putney* (1)), for instance, seems to be very clearly in point. But it is not necessary to go through earlier authorities, since in the case of *London County Council* v. *Churchwardens, &c., of Erith* (2), which is supposed, I know not why, to lend some plausibility to the argument, Lord Herschell, in a judgment adopted by all the noble and learned Lords, says (3): "Now if land is 'struck with sterility in any and everybody's hands,' whether by law or by its inherent condition, so that its occupation is and would be of no value to any one, I should quite agree that it cannot be rated to the relief of the poor," and other words to a similar effect are contained elsewhere in the judgment.

It has been suggested that part of the property might be separately rated; but the answer to this is that no part can be separated in use from the rest without breach of the statutory provisions, and therefore the whole must be taken together for the purpose of assessment.

A. L. SMITH L.J. The Master of the Rolls has asked me to state that he agrees in the result of these judgments.

Appeal allowed.

Solicitor for appellants: *W. A. Blaxland.*

Solicitor for respondents: *William Honey.*

(1) 7 Q. B. D. 223. (2) [1893] A. C. 562.

(3) [1893] A. C. at p. 591.

E. L.

1896
May 12.

SOUTH STAFFORDSHIRE WATER COMPANY *v.* SHARMAN.

Detinue—Property by Finding—Chattels found on Private Property—Ring found in Pool of Water.

The possessor of land is generally entitled, as against the finder, to chattels found on the land.

The defendant, while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. He declined to deliver them to the plaintiffs, but failed to discover the real owner. In an action of detinue:—

Held, that the plaintiffs were entitled to the rings.

Bridges v. *Hawkesworth* (21 L. J. (Q.B.) 75) distinguished.

Appeal from the decision of the county court of Staffordshire holden at Lichfield.

Under a conveyance dated January 6, 1872, from the mayor, aldermen, and citizens of the city of Lichfield, the plaintiffs were the owners in fee simple in possession of the land covered by the Minster Pool in that city.

In August, 1895, the plaintiffs employed the defendant, together with a number of other workmen, to clean out the pool. During the operation several articles of interest were found, and the defendant, while so employed, found in the mud at the bottom of the pool two gold rings. The plaintiffs demanded the rings; but he refused to deliver them up, and placed them in the hands of the police authorities, who, by advertisement and otherwise, endeavoured to find the owner of the rings. Ultimately, being unsuccessful in finding the real owner, the police authorities returned the rings to the defendant.

The plaintiffs then sued the defendant in detinue for the recovery of the rings.

It was proved at the trial that there was no special contract between the plaintiffs and the defendant as to giving up any articles that might be found.

The county court judge gave judgment for the defendant, holding, on the authority of *Armory* v. *Delamirie* (1) and *Bridges*

(1) 1 Str. 504.

v. *Hawkesworth* (1), that the defendant had a good title against all the world except the real owner.

The plaintiffs appealed.

William Wills, for the plaintiffs. The county court judge was wrong. *Armory* v. *Delamirie* (2) is no authority in this case. The decision there was only that the finder of an article may maintain an action of trover for conversion of the article by a wrongdoer. *Bridges* v. *Hawkesworth* (1) turned on very special facts: there the articles were found in the public part of a shop, and it was held that they were not the property of the shopkeeper, but of the finder, because they never were within the protection of the house. But where an article is found on private property it is in the possession of the owner of that property, although he may be unaware of its existence: *Templeman* v. *Case* (3); *Reg.* v. *Rowe* (4); *Elwes* v. *Brigg Gas Co.* (5)

[He was stopped.]

Disturnal, for the defendant. The county court judge was right. The onus is on the plaintiffs to establish their title to the rings. Of course, if they can prove a de facto possession they are entitled to them. Blackstone says that if a man scatter his treasure into the sea or upon the surface of the earth there is such a dereliction of it that it is the property of the first finder. The mere ownership of land does not create presumptive possession in respect of all chattels found on the land. [He cited *Reg.* v. *Clinton* (6); *Brew* v. *Haren.* (7)]

LORD RUSSELL of KILLOWEN C.J. In my opinion, the county court judge was wrong, and his decision must be reversed and judgment entered for the plaintiffs. The case raises an interesting question. The action was brought in detinue to recover the possession of two gold rings from the defendant. The defendant did not deny that he had possession

(1) 21 L. J. (Q.B.) 75.
(2) 1 Str. 504.
(3) 10 Mod. 24.
(4) Bell C. C. 93; 28 L. J. (M.C.) 128.
(5) 33 Ch. D. 562.
(6) Ir. Rep. 4 C. L. 6.
(7) Ir. Rep. 11 C. L. 198.

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Lord Russell C.J.

of the rings, but he denied the plaintiffs' title to recover them from him. Under those circumstances the burden of proof is cast upon the plaintiffs to make out that they have, as against the defendant, the right to the possession of the rings.

Now, the plaintiffs, under a conveyance from the corporation of Lichfield, are the owners in fee simple of some land on which is situate a pool known as the Minster Pool. For purposes of their own the plaintiffs employed the defendant, among others, to clean out that pool. In the course of that operation several articles of interest were found, and amongst others the two gold rings in question were found by the defendant in the mud at the bottom of the pool.

The plaintiffs are the freeholders of the locus in quo, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must shew that they had actual control over the locus in quo and the things in it; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion, they were. The case is like the case, of which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges* v. *Hawkesworth* (1), is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor

(1) 21 L. J. (Q.B.) 75.

is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorized interference."

That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that any one had a real de facto possession, or a general power and intent to exclude unauthorized interference.

The case of *Bridges* v. *Hawkesworth* (1) stands by itself, and on special grounds; and on those grounds it seems to me that the decision in that case was right. Some one had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by Patteson J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."

It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.

(1) 21 L. J. (Q.B.) 75.

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SOUTH STAFFORDSHIRE WATER COMPANY v. SHARMAN.

WILLS J. I entirely agree; and I will only add that a contrary decision would, as I think, be a great and most unwise encouragement to dishonesty.

Appeal allowed; judgment for plaintiffs.

Solicitors for plaintiffs: *Burton, Yeates & Hart, for Johnson, Barclay & Rogers, Birmingham.*

Solicitors for defendant: *Nelson & Sons, for H. S. Chinn, Lichfield.*

A. P. P. K.

C. A.

1896

May 19.

[IN THE COURT OF APPEAL.]

WHITELEY *v.* EDWARDS.

Husband and Wife—Judgment against Married Woman—Separate Estate—Restraint on Anticipation—Arrears of Income due after Judgment—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 19.

Where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment; and the decision of the Court of Appeal to that effect in *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559) is not affected by the judgment of the House of Lords in *Hood Barrs* v. *Heriot* ([1896] A. C. 174).

APPEAL from an order of Kennedy J. at chambers.

The plaintiff obtained judgment against the defendant, a married woman entitled to separate estate the income of which was subject to a restraint on anticipation. After judgment was signed a part of the income arising from the settled estate accrued due and became payable to the defendant, but had not in fact been paid over to her by her trustees. A summons was taken out to appoint a receiver of these moneys. The learned judge refused to make an order, and against this refusal the plaintiff appealed.

Swinfen Eady, Q.C., and *T. Willes Chitty*, for the plaintiff. It is quite true that the money of which it is sought to appoint a receiver was not due at the date of the judgment; but that date is an accidental one, depending on a number of circum-

stances, and is not material. The material dates are the date of the contract and that at which it is sought to enforce the judgment. At the time of the summons the defendant was entitled to receive this money without infringing the restraint on anticipation, and it can therefore be made available to meet the judgment. In *Hood Barrs* v. *Cathcart* (1) this Court decided in both the judgments delivered that income of a married woman which was not due at the time of the judgment against her could not be made available by means of a receiver; and it was suggested by Kay L.J. in the second case that income already due but not received could not be touched. (2) This suggestion was approved in *Loftus* v. *Heriot* (3), the ground being that the cases of income due before and after the judgment were not distinguishable; but that decision was overruled in *Hood Barrs* v. *Heriot* (4) in the House of Lords. The ground on which it was overruled was that so soon as property becomes due to a married woman she can alienate it; and if so, it can be made available to meet her debts by the appointment of a receiver.

If this is a correct view of the judgment of the House of Lords, the decision in *Hood Barrs* v. *Cathcart* (1) is overruled; and the income in the present case, although it accrued due after the judgment, can be made available by the appointment of a receiver.

Oswald, Q.C., and *Eyre Thompson*, for the defendant. The decision of the House of Lords in *Hood Barrs* v. *Heriot* (4) deals only with the case of income due to but not received by the married woman at the date of the judgment, and does not touch the case of income which accrues due after the judgment. The law as to appointing a receiver in the latter case was laid down in *Hood Barrs* v. *Cathcart* (1) in the judgments delivered by both Davey L.J. and Kay L.J., and as it is not affected by the judgment of the House of Lords it is binding in the present case.

T. Willes Chitty, in reply.

(1) [1894] 2 Q. B. 559.
(2) *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, at p. 570.
(3) [1895] 2 Q. B. 212.
(4) [1896] A. C. 174.

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LORD ESHER M.R. On January 16, 1894, two judgments were delivered in this Court on two separate appeals. Those two cases raised a point which was common to both, and all the judges who were parties to those judgments agreed in their opinion as to that point. In the second case, that in which Kay L.J. delivered the judgment of the Court, another point was raised on which the learned judge expressed an opinion as part of the judgment of the Court. Afterwards, in the case of *Loftus* v. *Heriot* (1), this same point came before the Court for decision, and we determined it in accordance with the opinion that we had previously expressed. Our decision in that case was overruled in the House of Lords; and the question now before us is whether the House of Lords also overruled the judgment given on the point which was common to both the cases as well as that given in *Loftus* v. *Heriot* (1) in accordance with our previously expressed opinion. When we have determined this question we shall follow the decision of the House of Lords; and if they have overruled the judgments on both the points raised in *Hood Barrs* v. *Cathcart* (2), we should be bound in the case now before us. If only the point on which an opinion was given which was adopted in *Loftus* v. *Heriot* (1) is overruled, the judgment of the Court of Appeal on the other point is still in force and binds us. It is not necessary under these circumstances to go into the reasons for any of the judgments, but only to ascertain what was overruled. Looking through the judgments of the House of Lords in *Hood Barrs* v. *Heriot* (3), it appears to me that they are confined to the case of arrears of income in existence before the date of the judgment on which the claim to have a receiver appointed is founded, and do not touch the case of arrears which come into existence after the date of the judgment. It follows that in this case in dismissing the appeal we shall not be departing in any way from the judgment of the House of Lords, and, as we are bound by the decision of this Court, this appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. The plaintiff obtained judgment against the defendant, who is a married

(1) [1895] 2 Q. B. 212. (2) [1894] 2 Q. B. 559.
(3) [1896] A. C. 174.

woman with separate property restrained from anticipation, and he now asks for a receiver to attach rents which became due nine months after the date of the judgment. The judge at chambers refused, and in my opinion rightly, to make an order.

This matter of the appointment of a receiver of the income of property of a married woman came before this Court in two cases, which were argued on different days and before Courts differently constituted. The judgments in these cases were delivered one by Davey L.J. and the other by Kay L.J. on the same day, and are reported in [1894] 2 Q. B. 559. There was one question common to both cases, which was whether, when rents became due after the date of the judgment, a receiver could be appointed of such rents when the judgment debtor is a married woman with separate property restrained from anticipation. This Court held, in both cases, that under such circumstances a receiver could not be appointed. I do not repeat the reasons, but I adhere to every word of the judgment of the Court, of which I was a member, as delivered by Davey L.J. I think the decision is good law, and it has not been touched by the decision of the House of Lords in *Hood Barrs* v. *Heriot* (1), about which more hereafter. In the other case the judgment of the Court, of which I was also a member, was delivered by Kay L.J. and, as regards the question common to both cases, to the same effect; but in this judgment we went further, and decided that rent in arrear at the time of the judgment and subject to restraint on anticipation could not be touched until it had come into the proper hands of the married woman. Then came the case of *Loftus* v. *Heriot* (2), in which the rent which it was sought to get into the hands of a receiver had accrued due at the date of the judgment. This Court followed the opinion we had expressed in the judgment as delivered by Kay L.J., and decided that although the rent was due at the date of the judgment, as it had not come into the hands of the defendant the fetter on anticipation had not been removed, and no receiver could be appointed. I cite a few words from my own judgment in that case to shew what it was we then decided. I began my judgment by stating "the question in

(1) [1896] A. C. 174. (2) [1895] 2 Q. B. 212.

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A. L. Smith L.J.

this case is whether income of a married woman subject to restraint on anticipation becomes free separate property as soon as it has accrued due to her, or only when it has in fact come into her hands"; and later on I stated the conclusion we had previously arrived at in the case of *Hood Barrs* v. *Cathcart* (1), that "the restraint on anticipation continues until the money has come into the hands of the married woman." This case of *Loftus* v. *Heriot* (2) went to the House of Lords under the name *Hood Barrs* v. *Heriot* (3), and our judgment therein was reversed. In my opinion the judgment of the House of Lords does not touch the question now before us. It is impossible to read the judgments delivered by the learned Lords without seeing that what they dealt with, and alone dealt with, was income of a married woman due at the time of the judgment obtained against her, but which had not reached her hands. The House of Lords differed from this Court on the question as to whether this was money freed from the fetter of anticipation, and came to the conclusion that it was free money at the time of the judgment, and that the restraint on anticipation did not attach to it at that time. In my opinion the House of Lords left untouched the two decisions of this Court as to income not due at the time of the judgment, and the learned judge took a right view of this case in refusing to appoint a receiver. The result of all these cases upon executions upon judgments against married women whose property is fettered with the restraint upon anticipation is that if the income of the settled property is due at the date of the judgment a receiver, in a proper case, will be appointed; if such income is not then due a receiver will not be appointed. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Roche & Son.*

Solicitors for defendant: *Hood Barrs & Co.*

(1) [1894] 2 Q. B. 559. (2) [1895] 2 Q. B. 212.
(3) [1896] A. C. 174.

A. M.

In re THE COUNTY COUNCIL OF DERBYSHIRE AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DERBY.

1896
May 14, 15.

Practice—Interrogatories—Pollution of Rivers—Proceedings in County Court whether civil or criminal—Right of Complainant to Interrogate—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.

By s. 3 of the Rivers Pollution Prevention Act, 1876, every person who causes or knowingly permits sewage matter to flow into any stream shall be deemed to have committed an offence under the Act. By s. 10 a summary order may be obtained in the county court requiring any person to abstain from the commission of an offence against the Act, and any person making default in complying with such order shall pay to the person complaining such sum, not exceeding 50*l.* a day for every day during which he is in default, as the Court may order, and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court. Proceedings having been commenced in the county court for an order requiring the corporation of a borough to abstain from causing or permitting sewage to flow into a stream :—

Held, that the proceedings were not of a criminal or penal nature, and therefore that the complainants might interrogate the corporation.

APPEAL from an order of the judge of the Derby County Court.

The county council of Derbyshire instituted proceedings in the county court against the corporation of Derby for the purpose of obtaining an order under s. 10 of the Rivers Pollution Prevention Act, 1876 (1), requiring the corporation

(1) The Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3: "'Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act."

Sect. 10: "The county court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified; the Court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the Court seems meet. Previous to granting such order

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to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the River Derwent, any sewage matter.

On the application of the county council the county court judge made an order giving them leave to administer interrogatories for the examination of the defendants. The corporation appealed.

William Graham, for the corporation. The county council are not entitled to administer interrogatories in this matter. The rule applies here that no one is bound to give discovery which will expose him to the risk of any kind of punishment, whether it be by way of pains or penalties or forfeiture. Sect. 3 of the Rivers Pollution Prevention Act, 1876, creates a criminal offence, and s. 10 imposes a penalty—recoverable, it is true, as a debt—upon any person making default in complying with any requirement of an order of the county court made in pursuance of that section. The words in s. 3, "shall be deemed to have committed an offence against this Act," are sufficient to justify an indictment, the rule being that where the clause which creates an offence imposes a penalty and gives a remedy that is the only remedy to be pursued; but if the penalty is

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the Court may, if it think fit, remit to skilled parties to report on the 'best practicable and available means' and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

"Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall pay to the person complaining, or such other person as the Court may direct, such sum, not exceeding fifty pounds a day for every day during which he is in default, as the Court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court; moreover, if any person so in default persists in disobeying any requirement of any such order for a period of not less than a month or such other period less than a month as may be prescribed by such order, the Court may in addition to any penalty it may impose appoint any person or persons to carry into effect such order, and all expenses incurred by any such person or persons to such amount as may be allowed by the county court shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the county court."

imposed by another section of the statute the person committing the offence may be indicted on the substantive prohibitory clause: *Reg.* v. *Buchanan.* (1) The effect of ss. 3 and 10 clearly is to make the proceedings of a criminal and penal nature. The test is whether the statute gives any more than compensation to a person aggrieved by a breach of its provisions: *Jones* v. *Jones* (2); *Hobbs & Co.* v. *Hudson.* (3) In *Mellor* v. *Denham* (4) the Court of Appeal held that an information for disobedience of by-laws made by a school board under the Elementary Education Act, 1874, related to a "criminal matter" within the meaning of s. 47 of the Judicature Act, 1873; and in *Reg.* v. *Whitchurch* (5) an order of justices directing the defendant to abate a nuisance by filling up an ashpit was also held to be a "criminal matter" within the same section. In *Adams* v. *Batley* (6) the plaintiff was held entitled to administer interrogatories, because s. 2 of 3 & 4 Will. 4, c. 15, under which the action for an infringement of the plaintiff's dramatic copyright was brought, did not impose a penalty, but only provided for a payment by way of damages. Before the passing of the Judicature Acts the Courts of Equity would not allow discovery where penal consequences might result to the person required to give it, and those Acts have not altered the rule: *Hunnings* v. *Williamson.* (7)

Stanger, Q.C. (*T. G. Carver* with him), for the county council. This is not a proceeding to recover the 50*l.* penalty for disobedience of an order, but for an order to discontinue a nuisance. Such an order is in the nature of an injunction, and these proceedings are the same as an ordinary action to obtain an injunction: *Kirkheaton Local Board* v. *Ainley.* (8) If an order is made and is not obeyed, there must be separate and independent proceedings before the county court judge to enforce payment of the 50*l.* penalty. Any answers given to interrogatories in these proceedings will not lay the defendants open to a criminal charge or make them liable to penalties, and therefore

(1) 15 L. J. (Q.B.) 227.
(2) 22 Q. B. D. 425.
(3) 25 Q. B. D. 232.
(4) 5 Q. B. D. 467.
(5) 7 Q. B. D. 534.
(6) 18 Q. B. D. 625.
(7) 10 Q. B. D. 459.
(8) [1892] 2 Q. B. 274.

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this is not a penal action according to the authorities: *Martin* v. *Treacher*. (1) The use of the word "offence" in the Act is in no way conclusive that the proceedings are penal or criminal; the result of the proceedings must be looked at: *Adams* v. *Batley* (2); *Saunders* v. *Wiel*. (3) In *Reg*. v. *Whitchurch* (4) the immediate result of the proceedings might be the infliction of a fine. Proceedings under this Act are not of a criminal nature. There have been several appeals to the Court of Appeal in cases under the Act, and no appeal lies to the Court of Appeal in any criminal cause or matter: *Kirkheaton Local Board* v. *Ainley*. (5) [*Reg*. v. *Ambergate Ry. Co*. (6) was referred to.]

W. Graham, in reply. In the cases which went to the Court of Appeal the point was not taken that there was no right of appeal. This Act creates an indictable misdemeanour, and this is therefore a criminal matter.

GRANTHAM J. This is a case of considerable importance, and there are no authorities upon the precise point in question. For some time I felt a difficulty in holding that this was not a criminal or penal proceeding, and therefore within the principle of *Reg*. v. *Whitchurch*. (4) But, upon looking at the Act more closely and considering the object of the Legislature, I have come to the conclusion that this Act entirely alters the former procedure in cases of this kind. If the proceedings had been under the Public Health Act, 1875, the argument of the appellants would have been very strong; but the proceedings are under this Act of 1876, which alters and improves the procedure, and we must see whether, under this Act, the proceedings are criminal or penal. I have come to the conclusion that they are not to be treated as of a criminal but as of a civil nature. It seems to me that the object of the Legislature, because of the difficulty of enforcing rights against persons causing nuisances with sewage, was to change the form of proceedings from criminal to civil. The order of the county court judge was, therefore, right. The decision in *Reg*. v. *Whitchurch* (4) was

(1) 16 Q. B. D. 507.
(2) 18 Q. B. D. 625.
(3) [1892] 2 Q. B. 18, 321.
(4) 7 Q. B. D. 534.
(5) [1892] 2 Q. B. 274.
(6) 17 Q. B. 957.

based upon the decision in *Mellor* v. *Denham* (1), and it is, therefore, necessary to consider the latter case. That was a case under the Elementary Education Act, 1870, where a parent was summoned for a penalty for not sending his child to school. The proceedings were taken under the Summary Jurisdiction Act of 1848 (11 & 12 Vict. c. 43), and the Lords Justices said that it could not really be argued that the proceeding was not criminal.

In *Reg.* v. *Whitchurch* (2) it was held that the procedure created by the Public Health Act, 1875, for abating nuisances, under which procedure a penalty could be imposed in the first instance, was a criminal procedure. The Legislature saw that the remedy given by the Public Health Act, 1875, with respect to the pollution of watercourses was not a sufficient remedy, and passed this Act of 1876, which contains all necessary powers to obtain the abatement of the nuisance. Is there anything in it to shew that the proceedings are proceedings in a criminal matter? I think not. Every part of the statute shews that it was not intended to treat the matter as a criminal matter. The penalty provided for disobedience to the order of the county court is to be recovered as a judgment debt. The proceedings under the first part of s. 10 are proceedings of a civil nature. The provisions are absolutely inconsistent with a criminal proceeding, and the respondents are now only applying for an order under that part of s. 10. But it is argued that the appellants will be liable to a penalty under the second part of the section if they disobey the order which may be made. In my opinion, every part of the proceedings under the latter part of the section is intended to be of a civil nature. The objection of the appellants, therefore, fails, and the order of the county court judge was right.

COLLINS J. I am of the same opinion. I agree with the judgment of the county court judge and with his reasons. It seems to me that, primâ facie, the words of s. 3 would create a misdemeanour, the word "offence" being used. But it has

(1) 5 Q. B. D. 467. (2) 7 Q. B. D. 534.

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been held, in *Adams* v. *Batley* (1) and *Saunders* v. *Wiel* (2), that the use of the word "offence" is not conclusive upon that point. We must see what are the consequences which will follow, and if we find that what is described as an "offence" is followed, not by punishment, but by a remedy equivalent to that for a civil wrong, then the matter is not a criminal one. Applying that rule to the present case, we find that the Legislature provides a means of stopping a person from doing that which, perhaps, by the common law he has a right to do. It would be harsh to make a person a criminal for so doing. It is not necessary, in order to support a case under s. 3, to shew that there is a public nuisance, for proceedings may be taken although there is no public nuisance. We must look to see what are the consequences under the Act. The provisions of s. 10 are as follows: [The learned judge read s. 10.] The county court judge may do certain things at first, and it is only afterwards that he can impose anything which can be called a penalty—that is, upon disobedience of the order made in the first instance. In that event he can order the defendant to pay money as a means of enforcing his order. That order is really in the nature of an injunction, as was said in *Kirkheaton Local Board* v. *Ainley*. (3) Having regard to the serious consequences which follow upon the commission of a crime, and to the fact that the matter is referred to a civil judge, and that the Court of Appeal has treated an order under this Act as being in the nature of an injunction, and has entertained appeals as if it were not an order in a criminal cause or matter, I am of opinion that the proceedings are essentially civil and not criminal, and that the decision of the county court judge was right.

Appeal dismissed; leave to appeal.

Solicitors for defendants: *Satchell & Chapple, for Gadsby, Derby.*

Solicitors for plaintiffs: *Wynne, Holme & Wynne, for Hughes-Hallett, Derby.*

(1) 18 Q. B. D. 625. (2) [1892] 2 Q. B. 18, 321.
(3) [1892] 2 Q. B. 274.

W. A.

GILLESPIE BROTHERS & CO. *v.* CHENEY, EGGAR & CO.

1896
March 17.

Sale of Goods—Contract—Warranty—Implied Condition as to Fitness of Goods—Evidence—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.

By the Sale of Goods Act, 1893, s. 14, where goods are supplied under a contract of sale, and "the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

Coals were supplied under a written contract of sale containing no mention of the particular purpose for which they were required, though prior to the making of such contract the buyers made known that purpose to the sellers, who were coal agents, and relied on their skill and judgment. In an action for damages for breach of warranty by the sellers:—

Held, that evidence of what took place between the parties prior to the making of the contract was admissible to raise the implication of the condition specified in s. 14, and, therefore, by virtue of that section a warranty or condition by the sellers that the coals were reasonably fit for the purpose for which they were required must be implied:

Held, also, that a contract for the sale of coals under a particular description known in the coal trade was not "a contract for the sale of a specified article under its patent or other trade name" within the meaning of the proviso to s. 14.

Trial, before Lord Russell of Killowen C.J., of one of the questions arising in a commercial cause.

The action was brought to recover damages for breach of warranty of coals sold and delivered by the defendants to the plaintiffs.

The following facts appeared from the evidence given at the trial:—The plaintiffs were commission merchants and the defendants coal agents, both firms carrying on their business in the City of London. About the end of May, 1895, the plaintiffs received from Messrs. Lawrie & Co., Limited, correspondents at Barbados, a letter dated May 18, 1895, which, so

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far as is material, was as follows: "We have now decided to order a cargo of coal, and will ask you kindly to look after same getting us the very cheapest freight possible. . . . We will take whatever kind of coal you think it best to send us after satisfying yourselves of its suitability for the purposes we require—viz., the bunkering of steamers and ships of war, and of course it must stand well upon the British and Foreign Admiralty lists." This letter was taken by the plaintiffs to the defendants, and shewn to and left with them. On June 28, 1895, the defendants, who had previously supplied to the plaintiffs a cargo of 500 tons of coal (about which there was no dispute) to be shipped to Lawrie & Co., Limited, at Barbados, entered into the following contract in writing with the plaintiffs: "Memorandum of agreement. London, 28th June, 1895. That Messrs. Gillespie Brothers & Co. agree to buy and Messrs. Cheney, Eggar, & Forrester agree to sell a cargo of coal deliverable at Barbados per ship *Enrichetta M.*, now at Swansea, on the following conditions—viz., that the quantity is to be about 500 tons; that the coal is to be of the description known as Cyfartha Merthyr or Hills Plymouth; that the price, including cost freight and insurance, is to be 18*s.* 6*d.* per ton from alongside—address commissioner on charter for buyer's benefit; that payment is to be made as follows—viz., in cash in London in exchange for shipping documents less the freight or balance of freight which is to be paid in cash at the current rate of exchange for bills in London on unloading and right delivery of the cargo at port of discharge." Then followed clauses taken from the charterparty with respect to demurrage, exceptions from the shipowner's liability, and a stipulation that the seller's liability should cease on shipment. The coal, which answered the description in the contract as being Cyfartha Merthyr coal, was shipped on board the *Enrichetta M.*, and the invoice and shipping documents were forwarded by the plaintiffs to Lawrie & Co., Limited. In the invoice the coal was described as "Cyfartha Merthyr steam coal." On the arrival of the coal at Barbados it was found, as alleged by the plaintiffs, to be wholly unsuitable for the bunkering of steamers and ships of war, and this action was commenced. Subse-

quently an order was made at chambers that the question of liability should first be tried upon the assumption that the coals in question were not fit for bunkering purposes, and this was the question now tried.

The defendants' counsel at the trial objected to the admission in evidence of the letter of May 18, 1895; but the Lord Chief Justice overruled the objection, and admitted that and other evidence of what took place between the plaintiffs and the defendants in respect of the subject-matter of the contract of June 28, 1895, prior to that contract being made. It was part of the case set up for the defendants that they had expressly refused to give the plaintiffs any warranty as to the quality of the coal supplied by them under the contract.

Cohen, Q.C. (*H. F. Boyd* with him), contended that the facts of the case brought it within s. 14 of the Sale of Goods Act, 1893 (1); that the particular purpose for which the goods were required having been made known to the defendants by the letter of May 18, 1895, a warranty by them as to the fitness of the goods supplied under the contract must be implied, and that to establish the implication evidence of what took place between the parties before the contract was made was admissible. He admitted that if the defendants proved an express refusal by them to give a warranty the implication would not arise, nor would it if there was anything in the written contract inconsistent with such an implication.

Bigham, Q.C., and *R. M. Bray*, for the defendants, contended

(1) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract for sale, except as follows:—

"(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

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that, the contract of sale having been reduced into writing and purporting to contain all the terms agreed upon between the parties, evidence could not be given of extraneous facts and circumstances to raise the implication of a warranty within s. 14; that by that contract the defendants only undertook to deliver Cyfartha Merthyr coal, which they had done, and their undertaking was inconsistent with any implication of a further warranty. Counsel also suggested that the proviso to s. 14, sub-s. 1, of the Sale of Goods Act, 1893, applied to the sale of the coals in question. [In the course of the case they referred to *Randall* v. *Newson*. (1)]

LORD RUSSELL of KILLOWEN C.J. In this case I have not finally to dispose of the entire matter in controversy between the parties to the action; I have only to deal with the question whether, on the assumption that the coals supplied were not reasonably fit for the bunkering of steamers and ships of war, that constitutes a breach of any stipulation in the contract between the parties. The defendants' counsel have argued that the question is to be determined solely by reference to the terms of the contract itself, though their conduct of the case has not been quite consistent with that argument, because they have themselves relied upon conversations which took place anterior to the making of the contract, as excluding the application of s. 14 of the Sale of Goods Act, 1893. I will now state why I think that, even although there is a definite written contract made between the parties, it is impossible to exclude from consideration what took place before the contract was made—in other words, their antecedent course of conduct. In the first place, although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement. That is a consideration

(1) 2 Q. B. D. 102.

which does not apply to this case, because the plaintiffs are not relying upon an express antecedent stipulation in addition to what is to be found in the written contract. Coming closer to the subject-matter in question here, the course of dealing and conduct may be important to shew—and is necessarily so within the very terms of s. 14—that in the course of the antecedent negotiations the particular purpose for which the goods were required was stated to the seller, or to shew that the buyer relied on the seller's skill and judgment. Those are not things one would expect to find in the contract itself; they are matters to be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent but leading up to the contract itself. Again, and it was in this connection that the defendants themselves sought to rely upon what took place before the written contract was made, there may have been such an antecedent course of conduct pursued between the parties as would exclude the implication of warranty arising under s. 14. If the defendants had been able to satisfy me that they had expressly said, "We cannot give any warranty whatsoever as to the coal in question," I agree with the admission made by the plaintiffs' counsel that it would have been impossible to say that any implication arising under s. 14 was applicable. I have thought it right to say so much in justification of the admission of the evidence to which counsel for the defendants objected—namely, the evidence of the antecedent conduct and transactions of the parties leading up to the making of the written agreement.

Now as to the facts: [His Lordship reviewed the facts of the case, and referred to the contentions of counsel on either side, and came to the conclusion that there had been no refusal on the part of the defendants to give any warranty in respect of the coal they supplied.]

The questions are: First, does s. 14 apply at all to this contract? And, secondly, if it does, is there anything in the contract itself which excludes the application of s. 14? [His Lordship read the section.] There cannot, I think, be any reasonable doubt that the circumstances of this case fit in with and render

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Lord Russell C.J.

applicable the provisions of s. 14. I come to the conclusion that the plaintiffs, the buyers, by shewing to the defendants the letter of May 18, 1895, from the plaintiffs' principals stating what was wanted and for what purpose it was wanted, did by clear intimation make known to the defendants the particular purpose for which the coals were required, and in that statement there is, I think the further consequence involved that the buyers were relying upon that intimation to the sellers, and relying on the sellers' skill and judgment in supplying an article which should be reasonably suitable for the purpose in question. I do not think it was very seriously argued that the proviso to s. 14, sub-s. 1, applied here; but the proviso was alluded to, and I will deal with it. The words are, "provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." That obviously is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs, or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise. I am clearly of opinion that the proviso does not apply to this case. It is clear also, to my mind, that s. 14 is intended to deal with cases in which there is nothing in the contract itself from which it appears that the buyer made known to the seller the particular purpose for which the goods are required, or that he relied on the seller's skill and judgment. Those are facts which are to be supplied ab extra by other evidence. The result, therefore, is that where the contract is one coming within the description in s. 14, although the express contract be wholly silent on the subject, there will, under the circumstances described in that section, be annexed in point of law the implication which is there mentioned. I think that s. 14 applies to the circumstances of this case; and I therefore come to the conclusion that there was a warranty that these coals should be reasonably suitable for the purpose for which they were ordered—namely, for the bunkering of steamers and ships of war. On these grounds I must decide the

question which has come before me for decision in favour of the plaintiffs.

Judgment accordingly.

Solicitors for plaintiffs: *Druces & Attlee.*
Solicitor for defendants: *Thomas Eggar.*

W. A.

SPIERS & POND *v.* BENNETT.

1896
May 5.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 9—*Sale of Article of Food in altered state—Disclosure of Alteration—Mens rea.*

By s. 9 of the Food and Drugs Act, 1875, "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

The appellants, a firm of refreshment contractors, entered into a contract with a dairy company for the supply to them of milk; the contract containing a warranty by the company as to the purity of the milk to be supplied. Milk was delivered under the contract at a refreshment room of the appellants; it was handed in a can to one of their servants, who poured a portion of it into a churn, which was placed on the counter for the purpose of the milk being sold to customers; it was so poured that a less proportion of cream was in the milk that went into the churn than in the milk which remained in the can. The respondent bought a glass of milk at the counter; the milk was drawn from the churn, and on analysis shewed a deficiency of 17 per cent. of cream. Upon the glass in which the milk was served were engraved the words, "Not guaranteed as new or pure milk or with all its cream, see notices"; and upon the refreshment counter was a printed notice to the effect that all milk sold by the appellants was purchased by them under a warranty of its purity and genuine quality; that they took all possible precautions to ensure its supply to their customers in proper condition, but were unable to guarantee it as new, pure, or with all its cream, and did not, therefore, sell it as such:—

Held, that, assuming that the facts shewed an abstraction from the milk, there had been a sufficient disclosure by the appellants of the alteration to satisfy the requirements of the section.

In order to constitute the offence of selling an article in its altered state without disclosure of the alteration, it is unnecessary to shew a mens rea on the part of the seller.

CASE stated by a metropolitan police magistrate.

The respondent, a sanitary inspector under the Sale of Food

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and Drugs Act, 1875, had preferred a complaint against the appellants under s. 9 of that Act, charging them with having at Farringdon Street Station unlawfully sold a certain article, to wit, milk, from which the fat had been abstracted by skimming or otherwise to the extent of at least 17 per cent., without disclosing to the purchaser such abstraction or alteration. Upon the hearing the following facts were admitted or proved:—

The appellants were refreshment contractors, carrying on business at (amongst other places) Farringdon Street Station. On September 25, 1895, at about 2.30 P.M., the respondent entered the appellants' premises, walked up to the counter, and asked for a glass of milk; an assistant of the appellants thereupon poured out a glass of milk from a churn and handed it to him. The milk was obtained from the churn by means of a tap; but the churn was so constructed that no milk would flow from the tap unless and until by pressing a knob or button at the top of the vessel a piston-rod or "dasher" descended to and reached the bottom. The object of this arrangement was that the milk and cream should be kept properly mixed together. The milk, on flowing from the tap, was received and was supplied to the respondent in a glass whereon were distinctly written in blue colour the words "Not guaranteed as new or pure milk or with all its cream, see notices." On the counter, a few feet from the place where the respondent was standing when he was served with the milk, and facing the entrance to the refreshment rooms from the street, was placed a framed notice in these words: "Milk notice. Spiers & Pond, Limited, purchase all milk sold by them under a warranty of its purity and genuine quality, and take all possible precautions to ensure its supply to their customers in proper condition, but they are unable to guarantee it as either new, pure, or with all its cream and (to meet the requirements of the Sale of Food and Drugs Act) do not therefore sell it as such." The respondent, who informed the assistant that he had purchased the milk for analysis, and who otherwise complied with the requirements of s. 14 of the Act, stated that he saw the writing on the glass for the first time whilst he was in the act of dividing the milk as required by that section, and that he did not see the notice on

the counter until his attention was called to it by the assistant immediately afterwards. The milk, on being submitted to analysis, proved to be deficient in cream to the amount of 17 per cent.

It was proved on behalf of the appellants that the only milk supplied to their said refreshment rooms was supplied by the London and Provincial Dairy Company, and that at 7 A.M. on the day in question a servant of the company brought four quarts of milk in a can which was not locked or sealed, and placed it on the counter; that no other milk was brought to the premises on that day before the respondent visited them; that upon the arrival of the milk the appellants' assistant, after washing out the churn with hot water, poured into it the contents of the can until the churn was completely filled, and that the portion of the milk remaining in the can after the churn was completely filled was poured into two jugs and sent down to the kitchen. The appellants produced no evidence of any testing of the contents of the can of milk, nor of stirring or mixing together its constituent elements, save in so far as that was effected by the working of the churn. They proved that a contract in writing had been entered into in September, 1894, between the appellants and the dairy company for the supply of milk for twelve months from October 1, 1894, and that a warranty in writing, forming part of the said contract, had been given by the dairy company to the appellants in the following terms: "We the undersigned hereby warrant that all milk that shall be supplied by us to you shall be new milk in good condition pure and unadulterated in the same state as when taken from the cow without the addition of water or any other substance and without the abstraction of cream or any other constituent part of the milk."

It was contended for the appellants that the writing on the glass, together with the notice on the counter, constituted a sufficient "disclosure of the alteration" within s. 9 of the Act; and also that, by reason of the warranty, the case fell within the protection of s. 25.

It was contended for the respondent, (1.) that the notice and inscription on the glass did not constitute a sufficient "disclosure

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of the alteration" within s. 9 of the Act; (2.) that compliance with the provisions of s. 25 did not offer a defence to an offence against s. 9 of the Act. If the second contention was bad in law, he further contended (3.) that the appellants had failed to prove a written warranty within the meaning of s. 25, inasmuch as they had failed to prove that they had purchased the article in question (that is, either the specific glass of milk sold to the respondent or the specific can of milk from which such glass of milk was taken) with a specific written warranty to the effect that the article in question was the same in nature, substance, and quality as that demanded by the respondent, the written warranty of September, 1894, relied on by the appellants being a general warranty, and there being no connection close enough between such warranty and the glass of milk sold on September 25, 1895. If, however, there was a written warranty within the meaning of s. 25, then (4.) that the appellants had failed to prove that they had no reason to believe at the time they sold the glass of milk that it was not the same in nature, substance, and quality as that demanded and warranted, inasmuch as neither the glass nor the can was (as was possible) tested before the resale to the respondent; and (5.) that the appellants had failed to prove that they sold the milk in the same state as when they purchased it, inasmuch as there was no evidence that the milk poured from the can into the churn was stirred before being so poured or afterwards tested, or that the glass of milk was afterwards tested; and it was proved and admitted that the glass of milk was in fact deficient in fat to the extent of 17 per cent.

The magistrate found as facts that the milk supplied to the respondent had been delivered to the appellants under and in pursuance of the said contract, and that appellants had no reason to believe, at the time they sold the milk to the respondent, that it was otherwise than of the nature, substance, and quality demanded. He was, however, of opinion that, there having been an alteration in point of fact, the notices were only in the nature of a refusal to guarantee the quality of the milk, and did not therefore constitute a sufficient disclosure of the alteration within the meaning of s. 9 of the Act. And,

without expressing any opinion whether s. 25 afforded any defence to proceedings for an offence under s. 9, he was of opinion that the warranty relied on was too general to bring it within the protection of s. 25; and that, even if this contention of the respondent was wrong and the warranty was sufficiently specific, the appellants had nevertheless failed to shew that they sold the milk to the respondent in the same state as they had purchased it, as required by the latter part of s. 25. He accordingly convicted the appellants, and imposed a penalty of 40*s*.

The question for the opinion of the Court was, whether the appellants were properly convicted of the offence charged in the complaint.

Sir E. Clarke, Q.C. (*Grain* and *Foà* with him), for the appellants. There was no evidence of any abstraction of any of the constituent parts of the milk, and *Dyke* v. *Gower* (1), which may be cited to the contrary, was wrong in holding that there had been any abstraction under the circumstances of that case. But, assuming that there had been an abstraction within the meaning of s. 9, it is necessary, in order to bring the seller within the latter part of that section, to shew a mens rea on his part; the first part of the section requires a mens rea on the part of the person who actually makes the alteration, who must do so with the intent that the article of food may be sold in its altered state without notice; the latter part of the section was intended to deal with the seller who, knowing that the thing has been altered, sells it without disclosure of the alteration. There has in any case been a sufficient disclosure of the alteration to satisfy the section. The expression "without disclosure" means "without notice" —that is, such notice as the seller can give.

[He was stopped by the Court.]

Channell, Q.C. (*Courthope Munroe* with him), for the respondent. It is unnecessary to shew a mens rea on the part of the seller in proceedings under the latter part of s. 9; the section imposes an absolute prohibition against the sale of an article of

(1) [1892] 1 Q. B. 220.

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food in an altered or deteriorated state, unless notice of such alteration or deterioration is given by the seller to the purchaser, and penalties are imposed to prevent such a thing happening at all. *Dyke* v. *Gower* (1) is a binding authority on this point. There was no disclosure of the alteration within the meaning of the section: the appellants did not tell the customer that there had been an alteration; they merely said that they did not guarantee the quality of the milk; they were not called upon to guarantee it, for they could sell the altered article if they gave notice of the alteration. It is not sufficient for the seller to say that he does not know whether there has been an alteration.

Sir E. Clarke, Q.C., in reply. The notice given was all that was possible; it need not be a notice of the specific alteration: *Gage* v. *Elsey* (2); *Pope* v. *Tearle*. (3)

LORD RUSSELL of KILLOWEN C.J. I should be very reluctant to say anything which might have the effect of interfering with the enforcement in a proper case of a very salutary Act; but, looking at the whole of the circumstances in the present case, I cannot help thinking that it is one in which the zeal of the inspector has outrun his discretion, and that he would have been well advised to abandon further proceedings when the facts had fully transpired. It cannot be doubted that the appellants did all that any reasonable trader, dealing in such an article and selling it under such circumstances as those in the present case, could be expected to do in order to comply with the salutary provisions of this statute. These considerations do not, however, dispose of the case, and we have to determine whether in fact the appellants have complied with the Act of Parliament; in other words, whether there was evidence upon which the magistrate was justified in coming to the conclusion that the appellants ought to be convicted.

No precise point is reserved for us in the case as stated; but, after stating the facts and the contentions on either side, the learned magistrate asks us whether the appellants were properly

(1) [1892] 1 Q. B. 220. (2) 10 Q. B. D. 518.
(3) L. R. 9 C. P. 499.

convicted. In order, therefore, to make my view intelligible, it is necessary for me shortly to recapitulate the facts. The appellants have a contract with a dairy company for the supply of pure milk, and a very precise warranty was given in the contract by the vendors that the milk should be delivered in a pure and natural condition, and without the abstraction of cream or any other of its valuable constituent parts. Under this contract a small quantity was delivered to the appellants on the day in question; a servant of the appellants took the can in which it was brought, and poured out enough to fill the churn which has been produced; the rest he poured into jugs, which went to the kitchen to be used for other purposes. The customers at the refreshment bar were served from the churn, which I understand to be so constructed that before the milk can run out of the tap into a glass the "dasher" must be put in operation by pressing a button at the top; and so, by means of this mechanical contrivance, which moves up and down in the churn and mixes the milk, all the milk drawn off is of about the same quality. The learned magistrate came to the conclusion that there had been an abstraction from this milk of some of the cream, and on that part of the case we are left rather to grope our way in the dark. I gather now, however, from the statements of counsel and from the shorthand notes, that it is supposed that the person who poured a portion of the milk into the churn, and the remainder into the jugs that were taken to the kitchen, so poured it that a larger proportionate quantity of cream was left in the milk that remained in the can, and was afterwards poured into the jugs for the kitchen, than was in the milk that went into the churn for the refreshment bar. This is a point of fact upon which, if I had had to decide it, I should have liked to have had more detailed evidence; for if the milk had been brought absolutely fresh by the dairyman, and had been dealt with at once by the appellants' servant, it is clear that no manipulation in pouring it out would effect any substantial alteration in the proportions of its constituent parts: such an alteration could be so effected only if the milk had been standing for some time. I take it, however, that we must assume that it was admitted that in fact an abstraction,

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although not intentionally effected, had taken place which amounted to an alteration of the milk within the meaning of s. 9 of the Act of 1875. I do not desire to express any opinion upon the cases which have been cited in argument, especially on the case of *Dyke* v. *Gower*. (1) There is no doubt, however, that to constitute an offence within the latter part of s. 9 a mens rea is unnecessary; and I think that if an article which has in fact been altered by abstraction is sold without disclosure of such alteration, the case falls within that part of the section. As to what constitutes an abstraction, very difficult questions might arise; and if in dealing with an article like milk the seller had not omitted to take any proper step to preserve the proper proportion of the constituent parts, I should feel considerable difficulty in holding that the case came within the section merely because what was left of the milk in the evening contained a less proportion of cream than the milk sold earlier in the day. But we have not to deal with that question.

I come now to what I conceive to be the real point in the case. If the onus is upon the seller to establish the fact that he disclosed the alteration to the purchaser, can it be said that in the present instance the appellants made an adequate disclosure of the alteration? Upon the whole, though not without some hesitation arising from the language of the section, I have come to the conclusion that they did make such adequate disclosure. It is conceded that they were not bound to disclose the precise character of the alteration: they were not bound to say, "This is milk which has had 20 or 30 per cent. of its fatty particles abstracted"; but it is contended that they were bound to make disclosure of the fact of an alteration. What did they do, and did it amount to a disclosure? In the first place, upon the glass in which the milk was handed to the purchaser was engraved this notice: "Not guaranteed as new or pure milk or with all its cream, see notices." I agree that this by itself does not amount to much more than an invitation to the purchaser to take notice that the milk is not sold to him with any guarantee as to its purity, &c. But this notice, if fairly con-

(1) [1892] 1 Q. B. 220.

strued, amounts to this: "There may be an alteration in the quality of this milk: of that fact or of the extent of the alteration we cannot be certain; but if there is, we are giving you notice of it." The case, however, does not stop there; the other notice, which was placed upon the counter, goes further, although no doubt it was in part drawn with reference to s. 25 of the Act. The language of that notice, if construed according to its ordinary sense, means this: "We are dealing in an article the exact condition of which, at the time of sale, it is impossible for us to predicate; we deliver it as we get it, and we do our best to ensure that it is delivered in the best condition, and we do not sell it as milk from which no part has been abstracted." That may not be a statement in the express terms of the statute; but it would be a slavish adherence to the letter and a disregard of the spirit of the enactment if we were to say that a seller giving this notice was liable to a penalty just as though he had made no disclosure at all. I desire to add that my hesitation proceeds solely from the particular language of the section; but I think that we are doing no violence to its language, and certainly we are doing none to its spirit, in holding that the statute has been substantially complied with, and that this conviction was wrong.

Upon the question of the onus of proof in such a case as the present, my brother Wills has pointed out to me the language used in the section, and it is by no means clear that the onus of proof of disclosure rests upon the party charged; it may be that proof of non-disclosure lies upon the prosecution as part of the definition of the offence.

WILLS J. I am of the same opinion upon all points.

Appeal allowed.

Solicitors for appellants: *H. J. & T. Child.*
Solicitor for respondent: *Matthew H. Hale.*

W. J. B.

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May 6.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE DARTFORD RURAL DISTRICT COUNCIL *v.* BEXLEY HEATH RAILWAY COMPANY.

Railway Company—Footpath—Bridge—Mandamus—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 46, 49, 50, 61.

Sect. 46 of the Railways Clauses Consolidation Act, 1845, does not impose upon a railway company, whose line crosses a public footpath, the obligation of carrying the footpath over the railway or the railway over the footpath by means of a bridge.

APPEAL from an order of a Divisional Court (Day and Lawrance JJ.) making absolute a rule for a mandamus directing the defendant company to carry a certain public footpath over their railway or their railway over the footpath by means of a bridge.

The facts, so far as material, were as follows.

The defendant company were a railway company incorporated under the Bexley Heath Railway Act, 1883, and authorized by that Act and subsequent special Acts to construct a railway and works in connection therewith. The railway so authorized crossed the footpath in question, which was situated in a parish within the district of the prosecutors, the Dartford Rural District Council. The railway had been carried across the footpath on an embankment twenty feet high, and persons wishing to use the footpath had to ascend the embankment by steep wooden steps, cross the line on the level, and descend on the other side by similar wooden steps. The special Acts of the defendant company contained no provision with respect to the footpath requiring the company to make a bridge.

Farwell, Q.C., and *E. Boyle*, for the defendant company. There is no statutory duty imposed upon the company to make a bridge in the case of this footpath. Having regard to the

character of the bridges provided for in the sections relating to bridges in the Railways Clauses Consolidation Act, 1845, namely, ss. 46, 49–51, it is clear that those sections do not apply to footpaths. The effect of s. 46, which provides for a bridge where the line of the railway crosses any turnpike road or public highway, is narrowed by the subsequent sections (49, 50), which clearly shew that only bridges over carriage-roads are contemplated.

Macmorran, Q.C., and *Hohler*, for the prosecutors. It is submitted that the true construction of s. 46 of the Railways Clauses Consolidation Act, 1845, is that it is a general provision with regard to all cases in which a railway crosses a highway, and is not confined to carriage-ways. This is shewn by the proviso at the end of the section, which provides, "that, with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage-road, on the level." The words "of the height and width, &c., in that behalf provided" only apply to cases where there is a provision as to the mode of construction of the bridge either in the special Act or in the subsequent sections of the general Act. Where there is no such provision, as in the case of a footpath, the obligation is to provide a reasonably sufficient bridge. The proviso to s. 46 and s. 59 shew that it is illegal to carry the railway across any highway on the level with the exception that in the case of a highway other than a public carriage-way it may be done with the consent of two justices.

Farwell, Q.C., in reply.

LORD ESHER M.R. In this case the railway company were empowered by their special Act to make a railway which by the plans was to cross a public footpath; and they have carried their line on an embankment across the footpath, so that any one who wishes to exercise the public right of using this footpath must go up the embankment on one side, cross the line on the level, and go down the embankment on the other side. It is now alleged that this causes danger and inconvenience,

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and that it is the duty of the company to carry the footpath over the railway or the railway over the footpath by means of a bridge; and application has been made for a mandamus to compel them to adopt one or other of these alternatives. The Divisional Court have granted that application, and the question which we have to decide is whether they had power to do so. That depends upon the question whether any duty has been imposed upon the railway company by statute to do what the mandamus directs them to do. In dealing with that question it is to be observed that the company's special Act does not contain any provision making it their duty to construct a bridge with regard to this footpath. It is contended, however, that the provisions of the general Act, the Railways Clauses Consolidation Act, 1845, make it their duty to do so. If that duty be imposed at all, it is by the group of sections beginning with s. 46. Then do those sections impose upon the company the duty of making a bridge with regard to a public footpath? The term "public highway" at the commencement of s. 46 would, taken by itself, be large enough, no doubt, to include a public footpath. The enacting part of the section is, however, not a general enactment that in cases within the section a bridge shall be made, but an enactment that a bridge of a particular description shall be made, namely, of the height and width, and with the ascent or descent provided for by subsequent sections of the Act, or by the special Act. When we look to the subsequent provisions of the Act with regard to the character of the bridge to be made under s. 46, it is obvious that they are such as cannot, according to any reasonable interpretation of the Act, be applied to a footpath. It is impossible to suppose that the Legislature intended to impose on railway companies such an absurdly extravagant liability as would be involved in making a bridge of the character specified in the case of a footpath. I therefore think it clear that s. 46 does not impose upon the company the liability of making any bridge at all in the case of a footpath; and none of the sections subsequent to s. 46 appear to me to do so. Sect. 61 contains at the commencement general provisions with regard to cases where the railway crosses highways other than public carriage-

ways on the level, and subsequently makes a specific provision with regard to footpaths; so that, when the Legislature intended to deal with footpaths in this group of sections, they did so in express terms. But that section does not impose on the company the duty of making a bridge. It therefore appears that neither by the special nor the general Act is any duty imposed on the company such as that which it is sought by this mandamus to impose upon them; and, consequently, the Divisional Court had no power to order that a writ of mandamus should issue as they did. Our decision on this point, which does not appear to have been taken in the Court below, disposes of the case. For these reasons I think the appeal should be allowed.

A. L. SMITH L.J. The point in this case is whether a statutory obligation is imposed by the Railways Clauses Consolidation Act, 1845, upon the company to carry this footpath over their railway or their railway over this footpath by means of a bridge. This point does not seem to have been brought before the Divisional Court. On reading s. 46, which is the section relied upon in support of the application, I cannot find that it imposes on the company any statutory obligation to make a bridge as ordered by the Divisional Court in respect of this footpath. The term "public highway" at the beginning of the section, taken apart from the context, would no doubt include a public footpath; but, when the enacting part of the section is looked at, we find that the obligation is not merely to construct a bridge, but to construct a bridge "of the height and width and with the ascent or descent by this or the special Act in that behalf provided." Sects. 49 and 50 contain the provisions as to the construction of bridges, and, without going into details, it is sufficient to say that those provisions are wholly inappropriate to footpaths. Going through the subsequent sections, I find nothing applicable to a footpath till I come to s. 61, in which for the first time a footpath is mentioned. That section deals with cases where the railway crosses a highway other than a public carriage-way "on the level," which means, I think, wherever the line is not carried

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over the highway or the highway over the line by means of a bridge; and it provides that in such cases, "the company shall at their own expense make and at all times maintain convenient ascents and descents and other convenient approaches, with hand-rails or other fences, and shall, if such highway be a bridle-way, erect and at all times maintain good and sufficient gates, and, if the same shall be a footway, good and sufficient gates or stiles, on each side of the railway where the highway shall communicate therewith." The company have complied with that section, and I cannot find any obligation imposed upon them by that or any other section of the Act to make a bridge. Therefore the application for a mandamus fails, because the applicants fail to make out the statutory duty on the part of the company which they allege.

RIGBY L.J. I also am of opinion that the appeal should be allowed. The question is whether under s. 46 of the Railways Clauses Consolidation Act, 1845, a statutory obligation is imposed upon the company in the case of a footpath to carry the railway over the footpath or the footpath over the railway by means of a bridge. The section says that, "if the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge"; but the section does not stop there. It does not require the construction of a bridge generally, but a bridge "of the height and width and with the ascent or descent by this or the special Act in that behalf provided." When, on looking to the subsequent provisions of the Act with regard to the construction of bridges, one finds that provision is made with regard to bridges over carriage-roads but none as to bridges over footpaths, the true construction would seem to be that the Legislature left the case of a footpath to be provided for, if it were deemed necessary, by the special Act. I therefore come to the conclusion that, where, as in this case, the special Act imposes no obligation to make a bridge in the case of a footpath, no such obligation is imposed by the general Act. Therefore the Court

has no jurisdiction to order the company by mandamus to do the work which it is sought to compel them to do.

Appeal allowed.

Solicitors for prosecutors: *Pyke & Parrott, for J. & J. C. Hayward, Dartford.*

Solicitors for defendants: *Dollman & Prichard.*

E. L.

THE RHYMNEY IRON COMPANY, LIMITED, APPELLANTS *v.* FOWLER (SURVEYOR OF TAXES), RESPONDENT.

1896 *May* 13.

Revenue—Income Tax—Deductions—Colliery—Subscriptions to Coal Owners' Association—Money wholly laid out for Purposes of Trade—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Rules applying to First and Second Cases, rule* 1.

The owners of a colliery were subscribers to a coal owners' association, which indemnified its subscribers against losses occasioned by strikes. In returning the profits of the colliery for income tax purposes they claimed to deduct the yearly average excess of their contributions over the amounts received by them as indemnities:—

Held, that the money sought to be deducted was not money wholly and exclusively laid out for the purposes of trade, and therefore the deduction could not be allowed.

CASE stated by the Commissioners for the General Purposes of the Acts relating to Income Tax.

The general manager of the Rhymney Iron Company, Limited, appealed against an assessment made upon the company as colliery proprietors, under Sched. D of the Income Tax Acts, for the year 1895–1896, on the ground that in arriving at the profits assessable no deduction had been made for the sums contributed by the company to the Monmouthshire and South Wales Coal Owners' Association.

The amount claimed as a deduction was 601*l.* 5*s.*, being the yearly average of the excess of their contributions over the amounts received as indemnities during the two years to April 5, 1895.

The appellant company were members of the Monmouthshire and South Wales Coal Owners' Association, and paid to the

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funds of that association the subscription provided for in the deed of arrangement of the association.

The appellants argued that these payments were proper deductions, inasmuch as they were disbursements wholly and exclusively laid out or expended for the proper business purposes of the colliery.

A reference to the deed of arrangement between the members of the association shewed under clause 63 what subscriptions were payable by members of the association.

Clauses 80, 81, 82, and 84 provided for the support by the association of any member by way of indemnity on a scale which was clearly laid down.

It might be the fortune of a company to maintain uniform satisfactory arrangements with workmen, and in such a case no indemity would be sought for by, or paid by the association to, a member finding himself in such a position.

It might however happen that a member might join the association, and practically immediately upon his doing so become placed in such a position that he would be justified in seeking the assistance of the association, and he might receive, as had been the case in some instances, payments far in excess of any subscriptions which he would be liable to under the rules of the association.

The appellants urged that the subscriptions made to the association should be treated as an insurance against loss caused by labour disputes, which frequently arose suddenly, and were often of such a duration as seriously to affect the prosperity of the trade, that these disbursements were made exclusively for the purposes of the trade, being made solely to secure and indemnify the subscriber against loss of, or diminution in, his general annual receipts.

The surveyor of taxes contended that by s. 8 of 29 & 30 Vict. c. 36, collieries were to be assessed according to the rules prescribed by Sched. D of 5 & 6 Vict. c. 35, so far as the same were consistent with the rules laid down in No. III. of Sched. A of the same Act; that the deduction claimed was not admissible, inasmuch as it did not fall within the scope of the deductions allowed by the rules of either Sched. A or Sched. D; that the

balance of profits and gains had repeatedly been held in the Exchequer Courts to be the difference between the receipts and the expenditure necessarily incurred in obtaining those receipts; that the contributions to the Coal Owners' Association were purely voluntary, and could cease at the option of the payer, and formed no part of the working expenditure of the colliery; that it had been clearly decided, in the case of *Watney* v. *Musgrave* (1), that the costs and expenses to be deducted from the receipts were only the costs and expenses of production of the articles; that the contributions were of a totally different character from the mere cost of production; and, further, that they were not a necessary payment in working the colliery, inasmuch as several colliery proprietors in the district did not subscribe to the association, but still succeeded in carrying on their business.

The commissioners decided that the subscriptions were not admissible as absolutely necessary working expenses of the colliery, and confirmed the assessment. At the same time they expressed a very strong opinion as to the good effect produced by the Monmouthshire and South Wales Coal Owners' Association in maintaining peace in the coal trade within the district covered by it, and considered that but for the association many districts would be probably at a standstill.

The question for the opinion of the Court was, were the contributions paid to the Monmouthshire and South Wales Coal Owners' Association a proper deduction in arriving at the profits of a colliery for income tax purposes?

The following clauses in the deed of arrangement were referred to in the case:—

63. "The subscriptions payable by a member shall be $1\frac{1}{2}d.$ for every ton of output for which he is assured," and further providing for times of payment, and payment of a further subscription in case of increase of output, and that there should be no rebate allowance or return of subscription.

64. Providing for payment of contributions by the members mentioned in the first schedule to the deed, among whom was included the appellant company.

(1) 5 Ex. D. 241.

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80, 81, 82, 83. Providing for indemnity on daily output in case of strike, and fixing the rates of indemnity.

84, 85. Providing for the continuation of indemnity till further direction by the association, and that the indemnity should cease in case of a member not acting in accordance with an order by the association to make concession to workmen.

Asquith, Q.C. (*Muir Mackenzie* with him), for the appellants. The appellant company are entitled to make the deductions which they claim. The contributions which they pay to the Coal Owners' Association are money wholly and exclusively laid out or expended for the purposes of their trade, within the meaning of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, Rules applying to the First and Second Cases, rule 1. These contributions are expenses incurred for the purpose of maintaining the colliery as a going concern, for if the appellants ceased to subscribe to the association they might very probably find themselves in such a position as to be unable to continue to carry on their business. It is not correct to treat the words "for the purposes of such trade," as equivalent to "for the purposes of carrying on such trade." The contributions are expenses wholly and exclusively laid out for the business purposes of the colliery.

Danckwerts (the Attorney-General (*Sir Richard Webster, Q.C.*) with him), for the respondent. The deduction claimed is inadmissible, for it does not fall within the scope of the deductions allowed by the rules of either Sched. A or Sched. D. The payments are voluntary contributions, which the appellant company may cease to pay if they think fit, and such contributions form no part of the necessary expenses of working the colliery. [He referred to *Watney* v. *Musgrave* (1); *Gresham Life Assurance Society* v. *Styles* (2); *Watson* v. *Royal Insurance Co.* (3)]

Asquith, Q.C., replied.

POLLOCK B. I do not feel any difficulty in deciding this case, although one always has a feeling in these cases that it seems

(1) 5 Ex. D. 241.
(2) 24 Q. B. D. 500; 25 Q. B. D. 351; reversed [1892] A. C. 309.
(3) [1896] 1 Q. B. 41.

hard on a man, doing what is prudent, that he should not, when he comes to face the Income Tax Commissioners, be in the same position as if he were facing trustees, or somebody to whom he had to render an account of how money was spent. But that is not the guiding rule in these cases. We must go, as has been said before by many Judges, by the words of the Act of Parliament, and we must not allow any item in favour of the person who is taxed merely because it is an item which would properly find its way into a profit and loss account, between a man and his partners, or as kept for himself. There are a great many things that a prudent trader might treat as deductions, because he wished to make a fund to provide against future accidents, and things of that kind, which are not dealt with at all by the Income Tax Acts.

Now in the present case this institution, which the commissioners themselves say is a very useful one, is an association whereby, according to rule 63, a subscription for every ton is payable by a member. Then, by rule 81, "A member shall be paid an indemnity on any deficiency of actual daily output, up to and not in excess of the tonnage assured, to be calculated upon an average of the actual output per day." That is not the case of a man who is doing something in order to keep up the colliery as a going concern. It is not like a man who is keeping a reserve, either of working power or of money, for the purposes of working the colliery. It is an indemnity for what may happen from many causes, especially in case of strike, namely, that the colliery is not working, and, while that is so, a loss is occasioned, not merely the loss of the daily earning of the colliery, but also the deterioration of the colliery while it is not being worked, and it may be flooded, or injured in other ways. When we come to the words of the Act specifying the deductions disallowed, which are these, "any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade" (1), it seems to me, without adding to those words, it would be sufficient to say this is not money laid out for the purposes of such

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, Rules applying to the First and Second Cases, rule 1.

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trade; it is money laid out in order to provide for an unfortunate contingency, by reason whereof the trade cannot be worked. That is a very different thing. It is true that the Judges have sometimes said that "expended for the purposes of such trade," means, "for the purposes of carrying on such trade." I do not think myself that it is necessary to make that addition in order to come to the conclusion at which I have arrived. I must say this, that, not only has the case of *Watson* v. *Musgrave* (1) nothing to do with it, but I doubt very much if this case could be brought within the principle of *Watson* v. *Royal Insurance Co.* (2), for reasons which I need not now go into.

In the result our judgment must be for the Crown.

BRUCE J. I am of the same opinion. I think we cannot extend the words in the first rule, "expended for the purposes of such trade" (3), so as to include expenses incurred to meet the contingency of loss while the trade is not being carried on.

I was very much struck at first with Mr. Asquith's argument, when he said the expenses were expenses incurred for the purpose of maintaining the colliery as a going concern, for the maintenance of the machine; but it is not for the maintenance of the machine for the purpose of carrying on the business, but it is for the maintenance of the machine while the business is not being carried on. I do not think we can give that extended meaning to the words.

Judgment for the respondent.

Solicitor for appellant: *H. Perry Becher, for Simon & Sons, Pontypridd.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

(1) 5 Ex. D. 241. (2) [1896] 1 Q. B. 41.

(3) See note 1, ante, p. 83.

P. B. H.

COOK, Appellant *v.* HAINSWORTH, Respondent.

1896
May 15, 18, 19.

Local Government—Local Authority—By-laws—Validity—Erection of New Buildings.

The appellant was convicted under a by-law, made under the Leeds Improvement Acts by the council of the city of Leeds, by which any person erecting any new building without giving twenty-one days' notice in writing of his intention to the corporation, or without having the plans approved of by the corporation, or in anywise contrary to plans and sections which had been approved by the corporation, was made liable to a penalty. It was not shewn whether or not the buildings erected by the appellant complied with the Leeds Improvement Acts. These Acts gave a right of appeal to quarter sessions from any determination of the corporation under the Acts:—

Held, that, having regard to the special provisions of the Acts, the by-law was reasonable and valid, and the appellant was rightly convicted.

Case stated by the stipendiary magistrate for the city of Leeds.

On October 29, 1895, an information was preferred by the respondent (who was the inspector of new buildings for the city), acting on behalf of the mayor, aldermen, and citizens, charging that the appellant did, on or about September 21, 1895, "unlawfully erect certain new buildings, to wit a house and shops, situate in Otley Road and Wood Lane, Headingley, in the said city, without having the plans thereof approved by the corporation of the said city, as required by by-law No. 61 of the by-laws with respect to new streets and buildings in the said city, duly made and ordained by the council of the said city, and then in force, and contrary to such by-laws"; and further alleging that, on October 1, 1895, the corporation gave written notice of the alleged offence to the appellant.

Certain by-laws with respect to new streets and buildings were duly made and ordained by the corporation, and were allowed by the Local Government Board on July 12, 1878. It was provided by by-law No. 61 that any person intending to erect any new building should give to the corporation twenty-one days' notice in writing of such intention by leaving the

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same at the office of the surveyor for the time being of the corporation, and should with such notice deposit plans and sections shewing in detail the situation, character and size of the proposed new buildings. It was further provided by by-law No. 63 that the corporation should approve or disapprove of the proposed new buildings within the twenty-one days specified for giving the notice aforesaid.

It was also provided by by-law 61 as follows: "Any person who shall erect any new building, &c., without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans approved of by the corporation, or in anywise contrary to plans and sections which have been approved by the corporation, shall be liable for each offence to the penalty hereinafter prescribed in these by-laws."

And by by-law No. 70 it was also provided that, "every person offending against any of the foregoing by-laws shall, except where otherwise expressly provided, be liable for every such offence to a penalty of 5*l.*, and in the case of a continuing offence to a further penalty of 40*s.* for each day after written notice of the offence from the corporation."

At the hearing of the information it was proved that, on June 14, 1895, the appellant gave to the corporation notice of his intention to erect a house and shops and other premises in Otley Road and Wood Lane, Headingley, and deposited plans and sections indicating in detail the situation, character, and size, of the buildings which it was proposed to construct. On June 24, 1895, the corporation gave to the appellant written notice that the plans were disapproved of by them, inasmuch as a back road in accordance with s. 57 of the Leeds Improvement Act, 1893 (1), was not provided, and the back of the

(1) 56 & 57 Vict. c. ccx. s. 57, sub-s. 1: "Every new continuous line of dwelling-houses, being through houses, shall, unless the corporation otherwise allow, have provided and set out in connexion with them one or more back streets fifteen feet wide, in such manner as to afford access for carts to the back of every house in such continuous line of dwelling-houses, and such back streets shall be kept free from any obstruction, and uncovered, and shall communicate at each end with a street. . . ."

Sub-s. 3: "In the event of there not being any building erected, or in course of erection, at the back of the dwelling-houses about to be erected

proposed house and shops would be less than nineteen feet and six inches from the boundary of the property, contrary to sub-s. 3.

Notwithstanding the disapproval of the plans by the corporation, the appellant commenced to erect certain buildings on the site indicated in the plans in Otley Road and Wood Lane, and on October 1, 1895, a notice was served on the appellant in the following terms:—

"Building Clauses Committee.

"September 27, 1895.

"Resolved, that legal proceedings be taken against George Cook, for having commenced the erection of a house and shops, and that application be made to the justices for an order of demolition, in pursuance of s. 22 of the Leeds Improvement Act, 1869." (1)

The appellant, however, proceeded with the erection of the buildings.

No evidence was tendered by either party to prove or disprove the allegation that the buildings which were described in the deposited plans did not comply with s. 57 of the Leeds Improvement Act, 1893, nor was evidence tendered by either party as to the character of the buildings actually constructed by the appellant.

It was contended by the appellant that by-law 61 (unless construed as if the restriction on the erection of buildings, in

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as aforesaid, such last-mentioned dwelling-houses shall not be erected within nineteen feet six inches of the boundary of the land of the person proposing to erect such dwelling-houses."

(1) 32 & 33 Vict. c. xi. s. 22: "In case any building be made or begun without, or not in accordance with, the consent of the corporation, where their consent is, by this or any of the recited Acts, required, or contrary to any requirement by the corporation, made in accordance with the provisions of such Acts, the corporation may make complaint thereof before a justice," and a summons shall issue, and if the complaint is proved, "the justice shall make an order in writing on the person summoned, directing the demolition, within such time as the justice deems reasonable, of the house, building, erection, or addition, or so much thereof as is made otherwise than in accordance with the consent or contrary to the requirement of the corporation," with costs.

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respect of which requisite notice of intention to build had been given, and plans deposited, related only to the period within which the corporation might approve or disapprove) was unreasonable, because it gave an absolute power of veto to the corporation, whether by-laws were complied with or not, and was ultra vires, inasmuch as it was not authorized by any statute; that the Public Health Act, 1875, s. 158 (1), limited the power of disapproval to cases where the proposed buildings were not in accordance with the by-laws, and that in *Reg.* v. *Mayor and Corporation of Newcastle-upon-Tyne* (2) it had been expressly decided that the corporation of Newcastle had not the power of veto claimed by the Leeds Corporation in this case.

It was contended on behalf of the respondent that the by-law (No. 61) was not ultra vires, but was expressly authorized by the local Acts in force in Leeds, reliance being specially placed on s. 51 of the Leeds Improvement Act, 1866 (3), s. 26

(1) 38 & 39 Vict. c. 55, s. 158: "Where a notice, plan, or description, of any work is required by any by-law made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed, ..."

(2) 60 L. T. (N.S.) 963.

(3) 29 & 30 Vict. c. clvii. s. 51: "The corporation from time to time may make, alter, and repeal such by-laws as they think proper with respect to the following matters (that is to say),

With respect to the level, width, and construction of new streets and courts, and the provisions for the sewerage thereof;

"With respect to the structure of walls of new buildings for securing stability and the prevention of fires;

"With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings;

* * * *

"And they may further provide for the observance of the same by making therein such provisions as they think necessary,

"As to the giving of notices;

"As to the deposit of plans and sections by persons intending to lay out streets or to construct buildings;

* * * *

"And as to the power of the corporation to remove, alter, or pull down, any work begun or done in contravention of such by-laws . . . ."

of the Leeds Improvement Act, 1872 (1), and s. 40 of the Leeds Improvement Act, 1877. (2)

Attention was also directed to the by-law forming the subject-matter of the decision of the Court in *Hall* v. *Nixon* (3), the penal clause of which is identical with that set forth in this case. The respondent also contended that the appellant, instead of commencing to erect buildings, should, if he thought himself aggrieved by any order, determination, or adjudication of the corporation, have appealed to the quarter sessions, under s. 128 of the Leeds Improvement Act, 1866 (4), which is incorporated with the Leeds Improvement Act, 1877 (5), or have applied to the High Court of Justice for a mandamus to compel the corporation to pass the plans. The respondent further contended that, by erecting new buildings without the approval of the corporation, the appellant had infringed by-law 61, and was liable to a penalty under by-law 70, and to a daily penalty for a continuing offence in maintaining the buildings after the receipt of the notice of October 1, 1895.

The magistrate held that the by-law was not ultra vires, and,

(1) 35 & 36 Vict. c. xcvii. s. 26: "Whenever, in pursuance or for any of the purposes of any Act now in force within the borough, or this Act, or any by-law made thereunder respectively, the owner or occupier of any land or building is required to deposit plans, sections, or elevations, previous to the laying out of any land, street . . . . or the erection or rebuilding of any building, and the corporation have power, within a reasonable limited time, to approve or disapprove of such plans, sections, or elevations, such owner or occupier shall not lay out or construct any such land, street . . . . and buildings, as the case may be, except in conformity with such plans, sections, and elevations as shall have been approved by the corporation. . . . ."

(2) 40 & 41 Vict. c. clxxviii. s. 40: "In addition to the powers conferred on the corporation by the Leeds Improvement Act, 1866, s. 51, the corporation may, subject to the provisions of that section, make, alter, and repeal, such by-laws as they think proper with respect to the following matters (that is to say),

"The prohibition of the commencement of any building without the approval by the corporation of the deposited plans of such building within a reasonable period to be specified;

"The approval by the corporation of the site on which it is proposed to erect any building. . . . ."

(3) L. R. 10 Q. B. 152, at p. 155.

(4) 29 & 30 Vict. c. clvii. s. 128: "If any person shall think himself aggrieved by any order, determination, or adjudication . . . . of the corporation, under the provisions of this Act, he may appeal to the quarter sessions. . . . ."

(5) 40 & 41 Vict. c. clxxviii.

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that the appellant, by erecting new buildings without having the plans thereof approved by the corporation, had infringed the provision of the by-law, and imposed a penalty of 3*l.*, inclusive of costs. He however held that the by-law did not create a "continuing" offence, and that the respondent was not entitled to claim a daily penalty from the receipt of the notice of October 1, 1895, the remedy (in case it could be established that the buildings contravened the provisions of the by-laws, or of the Local Improvement Acts), being by way of demolition of the buildings, under the powers conferred by the Public Health Act, 1875 (1), and the Leeds Improvement Act, 1869. (2)

The question for the opinion of the Court was whether the appellant was legally and properly convicted of the offence charged in the information.

Lawson Walton, Q.C., and *Bairstow*, for the appellant. (3) In the first place, on any reasonable construction which can be placed on the 61st by-law, the evidence given at the hearing before the magistrate was insufficient to justify a conviction.

Secondly, that by-law is ultra vires, for it is not justified by the provisions of any statute.

Thirdly, the by-law is unreasonable, for it gives an absolute and unqualified power to the corporation to impose a veto upon any building scheme which an owner may propose, quite independently of whether such scheme is in contravention of any of the provisions of the Leeds Improvement Acts or not.

[They referred to *Hall* v. *Nixon* (4); *Robinson* v. *Local Board of Barton Eccles* (5); *Reg.* v. *Mayor and Corporation of Newcastle-upon-Tyne.* (6)]

Forbes, Q.C. (*Sir Charles Morrison* with him), for the respondent, referred to *Baker* v. *Mayor, &c., of Portsmouth.* (7)

[He was stopped.]

LORD RUSSELL of KILLOWEN C.J. The question raised by this case is no doubt one of some importance, though I cannot

(1) 38 & 39 Vict. c. 55.

(2) 32 & 33 Vict. c. xi.

(3) The leading counsel was unable to be present on the second day, and the junior was allowed to continue the argument.

(4) L. R. 10 Q. B. 152.

(5) 8 App. Cas. 798.

(6) 60 L. T. (N.S.) 963.

(7) 3 Ex. D. 4, 157.

agree that it is a point of so great importance as the appellant appears to consider it to be. The appellant, who is the owner of certain property in Leeds, gave notice to the corporation of his intention to erect a house and shops, and other premises on his property, and he deposited plans and sections indicating in detail the situation, character, and size, of the buildings which it was proposed to construct. These plans were disapproved of by the corporation by the written notice of June 24, 1895, which is referred to in the case stated for our opinion. It was not, and could not be, suggested that the notice so given was not a notice of disapproval. Nevertheless the appellant proceeded with the erection of the buildings. In my opinion, the real question is whether by-law No. 61 is valid. If it is not, the attempt to punish the appellant for a violation of it cannot be sustained. If it is valid the conviction is right. The case came before the stipendiary magistrate for Leeds on an information charging the appellant with unlawfully erecting the buildings in question, without having the plans approved by the corporation, as required by by-law No. 61, and the information further alleged that the corporation gave written notice of the alleged offence to the appellant. At the hearing before the magistrate the corporation took the ground, not that they could, without any reason, disapprove of plans, and prohibit building operations, but that they had grounds for their disapproval, which they considered sufficient; but they further contended that the magistrate was not the person to determine as to the sufficiency of the reasons for their disapproval. They contended that the appellant had an opportunity of challenging their decision, either by means of an appeal to quarter sessions, if he should be so advised, or by an application to this Court for a mandamus. It would be absurd, in the face of the decision in *Reg.* v. *Mayor and Corporation of Newcastle-upon-Tyne* (1), to suggest that this corporation could be so ill advised as to take the ground that they could absolutely and arbitrarily prohibit the appellant's building operations. Yet the case was argued on behalf of the appellant on the ground that the corporation claimed such a right as I have referred to.

(1) 60 L. T. (N.S.) 963.

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Lord Russell C.J.

The following statement is contained in the case: "No evidence was tendered by either party to prove or disprove the allegation that the buildings which were described in the deposited plans did not comply with s. 57 of the Leeds Improvement Act, 1893, nor was evidence tendered by either party as to the character of the buildings actually constructed by the appellant." It is apparent from this statement that the question comes before us in this position:—We do not know whether the grounds on which the corporation proceeded were or were not valid within the meaning of s. 57 of the Leeds Improvement Act, 1893. The case therefore turns on the question of the validity of by-law No. 61. That by-law prohibits, first, the erection of new buildings without giving notice of intention to erect, and delivering plans and sections; secondly, the erection of new buildings without having the plans approved of by the corporation; and, thirdly, the erection of new buildings in anywise contrary to plans and sections which have been approved by the corporation. By-law 63 further provides that the corporation shall approve or disapprove of the proposed new buildings within the twenty-one days specified for giving the notice of intention to build. I do not stop to inquire what would happen if the corporation did nothing within the specified period. In that case the building owner, if he desired to keep on the safe side, would have a clear course to follow. A duty is imposed on the corporation to approve or disapprove within the specified time, and therefore, if the owner is advised that his plans are good, he can come to this Court for a mandamus, as was done in *Reg.* v. *Mayor and Corporation of Newcastle-upon-Tyne* (1); in such a case this Court could command the corporation to do one thing or the other, that is, either to approve or disapprove, according to the view the corporation might take of the plans. Besides this remedy the owner has also the right to appeal to quarter sessions. Then is there anything unreasonable in by-law No. 61? There would be a great deal to be said in favour of the appellant's contention, if that by-law gave the corporation an absolute power to disapprove of plans without any reason; but the

(1) 60 L. T. (N.S.) 963.

effect of the legislation referred to in the case is that the corporation having arrived at a decision, there is a remedy by appeal to quarter sessions against that decision, and there is also a remedy by application for mandamus. There can be nothing unreasonable in saying that primâ facie the corporation are right in the decision which they arrive at in the performance of a public duty, and that, unless their decision can be shewn to be wrong, it ought to be upheld.

For these reasons I have come to the conclusion that the by-law in question (No. 61) is not in any sense unreasonable. It is a fallacy to suggest that all that the corporation have to do is to enforce the provisions contained in the by-laws, for if no by-laws had been made, or if, outside the by-laws, there is some provision in an Act of Parliament, forbidding some particular act, or requiring some particular act to be done, in such a case the corporation would be entitled, and would be bound to take such facts into consideration in discharging the statutory duty devolving upon them of approval or disapproval.

The decision of the magistrate was right, and our judgment must be in favour of the respondent.

WILLS J. I am of the same opinion. The question is whether by-law No. 61 is reasonable and valid or not. In coming to the conclusion that it is reasonable I base my judgment on the existence of the special legislation giving power to appeal to quarter sessions from the decision arrived at by the corporation. I agree with the Lord Chief Justice in his concluding observations, where he pointed out that, if building owners contravene provisions contained in general legislation, the corporation ought to withhold their approval of the plans, even though they contravene no by-laws. Possibly also there may be other circumstances which may justify the refusal. But a by-law giving an unqualified and absolute power to the corporation under all circumstances and without qualification to proceed for a penalty because the work was done without their approval would be unreasonable. But the corporation are bound to approve or disapprove within twenty-one days, and if they disapprove, the local Act gives an appeal to quarter

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Wills J.

sessions. Under such conditions the by-law now in question is not unreasonable; though without the power of appeal I should not be inclined to say so. Sect. 158 of the Public Health Act, 1875, though in terms it deals only with power to pull down or remove buildings without an order, points out very clearly the reasonable limits within which the powers of local authorities ought, in default of special legislation, to be exercised, for it confines the right to pull down to cases where there is not only disapproval but contravention of a by-law. In the present case, the building owner has lost his appeal by lapse of time, but even so he is not stopped altogether, for in the present case the appellant can deposit a fresh set of plans, differing somewhat from those previously deposited, and he will have a right to appeal to quarter sessions if those plans are disapproved by the corporation. Under the special circumstances of this case it seems to me that there is nothing unreasonable in the by-law, and, without laying down what in other cases would be reasonable, I think this by-law is valid, and the decision of the magistrate is right.

Judgment for the respondent.

Solicitors for appellant: *Torr & Co., for Middleton & Sons, Leeds.*

Solicitors for respondent: *Patersons, Snow, Bloxam & Kinder, for Harrison, Town Clerk, Leeds.*

P. B. H.

THE QUEEN *v.* VESTRY OF ST. MATTHEW, BETHNAL GREEN.

1896
April 27;
June 2.

Metropolis—Management Acts—Sewer—Drain—Liability to repair—Drain made without Consent of Metropolitan Board of Works—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 69, 250.

The fact that the requisite consent was not obtained for the making of a sewer in the metropolis does not prevent it from being a sewer when made, and, as such, vested in the vestry and repairable by them under the Metropolis Management Acts.

In 1866 the owner of a block of houses in the metropolis drained them by a course of pipes which he laid down under the street, and which led into a sewer in a neighbouring street. No express order, consent, or approval of this work was given by the Metropolitan Board of Works or by the vestry:—

Held, that the pipes so laid constituted a sewer within the meaning of s. 250 of the Metropolis Management Act, 1855, and that it was vested in the vestry and repairable by them.

Rule nisi for a mandamus calling upon the vestry of St. Matthew, Bethnal Green, to shew cause why they should not maintain and from time to time repair a certain sewer.

In July, 1894, the School Board for London acquired certain lands in Tyrell Street in the parish of St. Matthew, Bethnal Green. At that time there were a number of houses on the land which were drained by a course of pipes which had been laid down in Tyrell Street by the owner of the houses in 1866, and which received the sewage from these houses and carried it along Tyrell Street into a sewer in a neighbouring street.

The houses were demolished by the school board, who erected premises on the land and connected them with the course of pipes; but on finding that these pipes were defective, they called upon the vestry to repair them. The vestry declined to do so on the ground that the pipes were not a sewer vested in or repairable by them.

The school board then obtained this rule nisi for a mandamus to the vestry.

Jelf, Q.C. (*Beven* with him), for the vestry, shewed cause against the rule. The question is whether these pipes constitute

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a "drain" or a "sewer" within the meaning of s. 250 of the Metropolis Management Act, 1855. (1) If they are only a "drain" they are not vested in the vestry by s. 68, and are not repairable by them. The pipes were laid in 1866 either with or without the approval of the vestry. If with their approval, that approval amounted to an "order": *Bateman* v. *Poplar District Board of Works* (2); and the pipes are a drain under s. 250 and not a sewer. There is, however, no record of any such approval or consent of the Metropolitan Board of Works or of the vestry being given; and by s. 69 of the Metropolis Management Act, 1855, which requires vestries to repair and maintain sewers, it is provided "that no new sewer shall be made without the previous approval of the Metropolitan Board of Works." That point was overlooked in *Kershaw* v. *Taylor* (3), which is, therefore, no authority in this case. See also 25 & 26 Vict. c. 102, ss. 47, 48, which requires that the consent of the Board of Works shall be signified in writing.

R. Cunningham Glen, for the school board, in support of the rule. *Kershaw* v. *Taylor* (3) is really decisive of the case. The "order" referred to in s. 250 is the "order" which the vestry have power to make by s. 74, that a group or block of houses be drained by a combined operation. There is no evidence of any such order having been made here.

Cur. adv. vult.

June 2. The judgment of the Court (Lord Russell of Killowen C.J. and Wright J.) was read by

LORD RUSSELL of KILLOWEN C.J. This is an application by the School Board for London against the vestry of a metropolitan parish for a mandamus to compel the vestry to repair a drain or sewer which was made in 1866, and receives the drainage and sewage of several houses, and is therefore

(1) By s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), "The word 'drain' . . . . shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board, and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies."

(2) 33 Ch. D. 360.

(3) [1895] 2 Q. B. 471.

primâ facie a sewer within the meaning of the Metropolis Management Acts and repairable by the vestry, as was held in *Kershaw* v. *Taylor*. (1) The vestry resist the application mainly on the ground—which they contend was overlooked in *Kershaw* v. *Taylor* (1)—that previous approval of the construction of the sewer does not appear to have been obtained from the Metropolitan Board of Works, as was required by s. 69 of the Metropolis Management Act, 1855, and other sections of that and the amending Acts. After the lapse of thirty years such consent ought, perhaps, to be presumed in the absence of clear disproof; but even assuming it to be clearly disproved, we think that the objection must fail. The mere fact that the requisite consent was not obtained for the making of the sewer does not prevent it from being a sewer when made. Further, we think that, from the circumstances stated in the affidavits and from the nature of the case, it ought to be inferred that the vestry knew and approved of the making of the sewer and of its connection with their principal sewer in the adjoining street, and cannot now raise the objection.

Another ground of less general importance is also taken, namely, that this sewer is within the exception from the general enactment of s. 250 of the Metropolis Management Act, 1855, as having been made "under the order of any vestry."

As to this objection, it is enough to say that there is no evidence to support it. As we have said, we think the sewer must have been made with the knowledge of the vestry, and without disapproval by them; but there is nothing to shew that it was made by their order. No such facts are proved as in *Bateman* v. *Poplar District Board of Works* (2) were held to be equivalent to an express order.

The rule for a mandamus will be made absolute with costs.

Rule absolute.

Solicitors for school board: *C. E. Mortimer.*

Solicitors for vestry: *R. Voss.*

(1) [1895] 2 Q. B. 471.

(2) 33 Ch. D. 360.

A. P. P. K.

1896
May 18.

In re An Arbitration between THE PORTLAND URBAN DISTRICT COUNCIL and TILLEY & CO.

Practice—Appeal from Chambers—Leave to revoke Submission to Arbitration—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An appeal from a judge at chambers granting leave to revoke a submission to arbitration lies to the Court of Appeal and not to a Divisional Court.

Appeal from the decision of Cave J. at chambers, affirming the order of a master allowing the plaintiffs to revoke a submission to arbitration.

Arthur Powell, for the defendants.
J. A. Foote, for the plaintiffs.

The Court (Pollock B. and Bruce J.) held that this was a matter of practice and procedure, and consequently that the appeal lay to the Court of Appeal under the Supreme Court of Judicature Act, 1894, s. 1, sub-s. 4, and not to a Divisional Court.

Appeal struck out.

Solicitors for plaintiffs: *Lovell, Son & Pitfield, for Bowen & Symes, Weymouth.*
Solicitor for defendants: *Herbert Toomer.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1896
June 2.

KIRBY *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Mayor's Court—Practice—Notice of Appeal—Extension of Time—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*)—*Order* LIX., *r.* 16.

Order LIX., r. 16, does not give the High Court power to extend the time for giving notice of appeal under s. 8 of the Mayor's Court of London Procedure Act, 1857.

APPEAL from an order of a Divisional Court (the Lord Chief Justice and Wright J.) reversing the order of a judge at chambers.

The facts were as follows. The plaintiff had brought an action for more than 20*l.* in the Mayor's Court of London which was tried before the common sergeant and a jury in November, 1894. The Common Sergeant directed a verdict for the defendants, and judgment was entered accordingly. No notice of appeal was given within two days, as required by s. 8 of the Mayor's Court of London Procedure Act, 1857. Upon an application made at the end of 1895, a judge at chambers made an order granting to the plaintiff an extension of the time for appealing from the judgment in the Mayor's Court. On appeal to the Divisional Court they reversed his decision. (1)

(1) By s. 8 of the Mayor's Court of London Procedure Act, 1857, it is provided that, "If either party appearing on the trial of any cause in which the sum sought to be recovered shall exceed the sum of 20*l.* shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any one of the superior Courts . . . . provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party or his attorney, and also give security within such time or times as the Court shall direct, to be approved of by the registrar of the Court (if the judge shall so direct), for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment if he be the defendant and the appeal be dismissed; provided nevertheless that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the Court shall

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KIRBY v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

J. W. Moyses, for the plaintiff. The giving of the notice of appeal within two days cannot be said to be a condition precedent to the right of appeal under s. 8 of the Mayor's Court of London Procedure Act, 1857. The time for giving notice of appeal is mere matter of procedure. By the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 23, it is provided that "the power to make rules conferred by s. 17 of the Supreme Court of Judicature Act, 1875, and enactments amending the same, shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior courts to the High Court." By Order LIX., r. 16, it is provided with regard to appeals from inferior courts that "the High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the Court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties."

The case of *Morgan* v. *Bowles* (1) is not in point. That case did not refer to the notice of appeal, but to the giving of security for costs. There is no provision in the rules affecting the enactment of s. 8 of the Mayor's Court of London Procedure Act, 1857, with regard to the security for costs.

[LORD ESHER M.R. referred to *In re West Devon Great Consols Mine*. (2)]

Roskill, for the defendants, was not called upon to argue.

LORD ESHER M.R. This case appears to me to depend upon s. 8 of the Mayor's Court of London Procedure Act, 1857. That section does not give a right of appeal absolutely, but only provided the party desiring to appeal does certain things, namely, gives notice of appeal within two days, and gives security for costs as mentioned in the section. I think that

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have ordered the party appealing to pay the amount of such judgment into the hands of the registrar and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial, on such terms as it shall think fit, or may order judgment to be entered for either party (as the case may be), and may make such order with respect to the costs of the said appeal as such Court may think proper: and such orders shall be final."

(1) [1894] 1 Q. B. 236.

(2) 38 Ch. D. 51.

the true construction of such an enactment is that the giving of that notice and the giving of that security are conditions precedent to the existence of the right of appeal, and, if they be not given, the section gives no appeal. The plaintiff did not give that notice. Construing s. 8 as I have done, it is clear that, unless the provision of that section which requires notice of appeal to be given within two days has been repealed by some subsequent Act of Parliament, no Court can give the plaintiff the power of appealing without having given that notice. I think the reasoning of Charles and Wright JJ. in the case of *Morgan* v. *Bowles* (1) applies to this case. There is nothing in the Judicature Acts which expressly alters the special provisions of the 8th section of the Mayor's Court of London Procedure Act, 1857. The rules made under those Acts do not appear to me to assume to do so, and I do not think that they could. The view taken by the Court in *Morgan* v. *Bowles* (1), which appears to me to be correct, was that general expressions used in the rules cannot be construed as intended to alter the effect of the special provisions of an enactment such as that contained in s. 8 of the Mayor's Court of London Procedure Act. In so holding they acted upon what was said by Cotton and Bowen L.JJ. in the Court of Appeal in *In re West Devon Great Consols Mine* (2), with which I entirely agree. I think that the learned judge at chambers had no jurisdiction to extend the time for appealing, and that the order of the Divisional Court was right and must be affirmed.

KAY L.J. In this case an action was tried in the Mayor's Court in November, 1894, when the verdict and judgment were for the defendants. By s. 8 of the Act regulating the procedure in the Mayor's Court, which was passed in 1857, notice of appeal must be given within two days after the decision from which it is sought to appeal. I cannot read that section otherwise than as making the giving of that notice a condition precedent to the right of appeal. No such notice was given in this case; and it was not till the end of 1895 that an application was made for leave to appeal, notwithstanding that there had

(1) [1894] 1 Q. B. 236. (2) 38 Ch. D. 51.

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Kay L.J.

been no such notice. The case is put thus. It is not denied that from 1857 down to 1884 there could not have been any such appeal unless notice of appeal had been given within the two days; but it is said that in 1884 the Judicature Act of that year, by a section which contains no mention whatever of the Mayor's Court, altered the previously existing state of things. Sect. 23 of the Judicature Act, 1884, provides that the power to make rules conferred by the Judicature Act, 1875, shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior courts to the High Court. By Order LIX., r. 16, which must be taken, I suppose, to have been made under that section, it is provided that the High Court shall have power to extend the time for appealing or to amend the grounds of appeal. I think from the collocation of that rule with the preceding rule that it must apply to appeals from inferior courts. We are asked to decide that the effect of the general Act of 1884 and the rule made under it has been to alter the procedure of the Mayor's Court as to appeals which had existed since 1857, although they make no express reference whatever to that procedure, and that, therefore, that which had since 1857 been an absolute condition precedent to the right of appeal is so no longer. I should hesitate to think that that could have been intended without more special words being used. I am disposed to think that any rule made under the Judicature Act, 1884, affecting to alter the provisions of s. 8 of the Mayor's Court of London Procedure Act would have been ultra vires; but I do not think that rule 16 of Order LIX. does affect to alter those provisions. It does not say that in the case of the Mayor's Court a party may be allowed to give notice more than two days after the decision appealed from, but merely provides generally that the time for appealing may be extended. It appears to me that the observations made in the judgments in *In re West Devon Great Consols Mine* (1), where Bowen L.J. referred to the well known rule that "generalia specialibus non derogant," apply to this case. I think that a rule in general terms such as rule 16 of Order LIX. cannot be taken to derogate from the special provisions of an enactment

(1) 38 Ch. D. 51.

to which it does not expressly refer. For these reasons I agree that the appeal should be dismissed.

A. L. SMITH L.J. I also think that the appeal fails. It seems to me clear that s. 8 of the Mayor's Court of London Procedure Act, 1857, only gives a right of appeal if notice of the intention to appeal is given within two days. Then, with regard to the construction of Order LIX., r. 16, I think that what was said by the judges in *Morgan* v. *Bowles* (1) applies. In my judgment the Rule Committee have no power to repeal the provisions of an Act of Parliament. They have power to make rules as to practice and procedure; but, if an Act of Parliament provides that, in order that there may be a right of appeal from the Mayor's Court, a certain notice must be given, I do not think the Rule Committee can repeal that provision by a rule.

I agree with the view expressed by this Court in *In re West Devon Great Consols Mines.* (2)

Appeal dismissed.

Solicitor for plaintiff: *A. H. Dabbs.*

Solicitors for defendants: *Bircham & Co.*

(1) [1894] 1 Q. B. 236.

(2) 38 Ch. D. 51.

E. L.

1896
May 19.

FOSTER, APPELLANT; FYFE AND ANOTHER, RESPONDENTS.

Mine—Inspector of Mines—Agent—Information, by whom it may be laid— 11 *&* 12 *Vict. c.* 43, *s.* 10—*Metalliferous Mines Regulation Act*, 1872 (35 *&* 36 *Vict. c.* 77), *s.* 35.

An information against the owner or agent of a mine for an offence under the Metalliferous Mines Regulation Act, 1872, which can be prosecuted before a court of summary jurisdiction may, if the inspector of mines of the district has determined to prosecute, be laid in his name by an agent duly authorized by him in that behalf.

CASE stated under the Summary Jurisdiction Acts by four justices of the county of Merioneth.

In December, 1895, D. J. Morgan, an inspector of police in the county of Merioneth, appeared before one of the justices of the county, and, purporting to act as a duly authorized agent for and on behalf of the appellant, one of Her Majesty's inspectors of metalliferous mines, made and laid an information against the respondents, charging them with having, contrary to s. 13 of the Metalliferous Mines Regulation Act, 1872, unlawfully failed to cause the top of the shaft of a disused mine, of which they were the owners, to be kept securely fenced for the prevention of accidents.

The commencement of the information was as follows: "The information of Clement le Neve Foster of, &c., Her Majesty's Inspector of Metalliferous Mines, by David Thomas Morgan, of, &c., inspector of police, his duly authorized agent in that behalf, who upon oath states that," &c.

At the hearing of the information before the justices in petty sessions, the appellant and one of the respondents appeared with their respective solicitors, and the respondents' solicitor took the objection that the information was bad because it was not laid by the appellant in person, and therefore did not comply with the provisions of s. 35 of the Metalliferous Mines Regulation Act, 1872 (1), and it was incompetent for him to lay the informa-

(1) The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 35: "No prosecution shall be instituted against the owner or agent of a mine to which this Act applies for any offence under this Act which can

tion by Morgan or any other person who had not the consent in writing of a Secretary of State.

It was admitted that the appellant was an inspector within the meaning of the Act, and that Morgan was not a person prosecuting or instituting the proceedings with the consent in writing of a Secretary of State.

The justices were of opinion that the information was not properly and duly laid, and declined to proceed with the hearing of the case.

The question for the opinion of the Court was whether their decision was correct.

Henry Sutton, for the appellant. It was competent for the appellant to lay the information by his duly authorized agent. Sect. 35 of the Metalliferous Mines Regulation Act, 1872, only provides that "no prosecution shall be instituted" before a court of summary jurisdiction, except by an inspector of mines, or with the consent in writing of a Secretary of State. If an inspector determines that a prosecution should be instituted, there is nothing to prevent him from laying the information by an agent. Sect. 33 provides that summary proceedings for offences under the Act may be taken in manner directed by the Summary Jurisdiction Acts, and s. 10 of 11 & 12 Vict. c. 43 (Jervis' Act), enacts that every complaint or information "may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf." There is nothing in s. 35 of the Act of 1872 to exclude the operation of this provision.

Macaskie, for one of the respondents. Sect. 35 requires that the inspector should personally appear before the magistrate and lay the information. He is placed in a quasi-judicial position, and has to exercise a personal discretion whether or not a prosecution shall be instituted. He cannot delegate to an agent

be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of a Secretary of State; and in the case of any offence of which the owner or agent of a mine is not guilty, if he proves that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against such owner or agent, if satisfied that he had taken such reasonable means as aforesaid."

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the performance of his duty, and then ratify what the agent has done. The institution of the prosecution is the laying of the information. The statute must be construed strictly. Prosecutions cannot be instituted except by an inspector or with the consent of a Secretary of State, which consent must be in writing. By s. 18 of Jervis' Act, where an information or complaint is dismissed by the justices, they may award costs against the informant or complainant. If the inspector can employ an agent to lay the information he might, when an order for costs is made against him, deny the agent's authority, and the defendant would then be placed in the difficulty of having to prove the authority in order to get his costs. Assuming that the appellant could lay the information by an agent, there is no evidence in this case that Morgan was authorized to lay it. The agent's authority should be strictly proved: *Anderson* v. *Hamlin*. (1) [He also referred to *Kyle* v. *Barber*. (2)]

LORD RUSSELL of KILLOWEN C.J. I think this case must be remitted to the magistrates with an intimation to the effect that, in our opinion, their view of the construction of s. 35 of the Metalliferous Mines Regulation Act, 1872, was wrong. The information was laid in the name of the present appellant, the inspector of mines for the district within the meaning of the Act. It was laid by Morgan, who is stated in it to be the duly authorized agent for that purpose of the inspector. The offence charged was that the respondents, being the owners of a metalliferous mine, the working whereof was discontinued did, on the day named in the information, unlawfully fail to cause the top of a shaft to be, and to be kept, securely fenced, contrary to s. 13 of the Act. At the hearing before the magistrates the only point taken was that, in order to comply with the provisions of s. 35, the information must have been laid by the inspector—that he could not authorize any one to lay the information in his, the inspector's, own name, because the statute required that he should himself lay it. That was the only point discussed before the magistrates, and I, therefore, do not think we can go into the question whether or not

(1) 25 Q. B. D. 221. (2) 52 J. P. 725.

there was sufficient evidence before them of Morgan having been authorized by the inspector to lay the information. If it were necessary to give an opinion on the matter, I should think there was ample evidence of Morgan's authority, and that, wholly apart from any ratification, the magistrates might properly have found that the inspector did give Morgan authority. That point, however, has not, I think, been reserved for our opinion. The contention at the hearing before the magistrates was that the information could only be laid by the inspector himself; they dealt with that point, and decided it in the respondents' favour, and the question we have to consider is, was their decision right? I think it was not. I agree in the observation that the scheme of this Act is to prevent any except a limited class of persons from instituting prosecutions under the Act. I agree also that the scheme of the Act is that the inspector should himself, a priori, use his judgment whether or not a particular prosecution ought to be instituted. But I see nothing in the scheme of this 35th section to exclude the application of s. 10 of Jervis' Act, which is incorporated with the Act of 1872. Sect. 10 of Jervis' Act authorizes every complaint to be laid or made "by the complainant or informant in person, or by his counsel or attorney, or other person authorized in that behalf." I think that the prosecution here was instituted by the inspector so as to comply with s. 35 of the Act of 1872, because he did authorize Morgan to lay the information in his, the inspector's, name. That is enough to dispose of this case. It was suggested that difficulties would arise as to costs if the information could be laid by an agent—that where a prosecution failed the defendant would be in the difficulty of having to prove, in order to get an order for costs against the inspector, that the agent was authorized to prosecute, and the authority might be repudiated. I may point out, however, that the same difficulty might arise under Jervis' Act, and apparently, as my brother Wills says, no such difficulty ever has arisen. Two cases were referred to by counsel for the respondents. In *Anderson* v. *Hamlin* (1) it was necessary to prove an authority to prosecute. The point that no authority had been given was distinctly raised by the case, and the Court

(1) 25 Q. B. D. 221.

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held that it was not made out by the evidence that the water-bailiff who laid the information had authority. The decision does not in any way apply to this case. As to *Kyle* v. *Barber* (1), I need only say that it was a very different case from the present, and also has no application to it.

For the reasons I have given, I am of opinion that our judgment should be for the appellant on the point raised by the case, which must, therefore, be remitted to the magistrates.

WILLS J. I am of the same opinion. Sect. 35 of the Metalliferous Mines Regulation Act, 1872, really gives a very important protection to mine-owners. It provides that the mental act of deciding whether there shall be a prosecution or not must be the mental act of the inspector, and that he cannot delegate the performance of that act to any other person. No question of the ratification by him of a prosecution can arise unless his was not the mental act, and his was not the will and judgment which decided whether or not the prosecution should be instituted. If the information has not been laid by him, as in this case, the magistrates have to satisfy themselves whether he did decide that the prosecution should be instituted, and whether he authorized the person who laid the information to lay it. Assuming they are satisfied on those points, I can see no reason why s. 10 of Jervis' Act, which is pointed to by s. 33 of the Metalliferous Mines Regulation Act, 1872, should not apply, and why an inspector under the Act of 1872 should not have the same facilities of laying informations by his duly authorized agent as are given to any other informant by Jervis' Act. It would be a most inconvenient state of things if, in a large district, the inspector had personally to go to petty sessions in order to lay an information. It would take up valuable time, and I can see no reason for saying that s. 35 imposes such an obligation upon him.

Judgment for the appellant. Case remitted to the magistrates.

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitor for respondents: *James Neal.*

(1) 52 J. P. 725.

W. A.

OSBORNE *v.* CHOCQUEEL.

1896
May 21.

Mischievous Animal—Evidence of Scienter—Ferocious Dog—Negligence.

In order to support an action for damages for the bite of a dog it is necessary to shew that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff; it is not sufficient to shew that it had to the defendant's knowledge attacked and bitten a goat.

APPEAL from a decision of the judge of the Marylebone County Court.

The action was brought to recover damages for injury sustained by the plaintiff by reason of his having been bitten by a dog belonging to the defendant.

At the trial evidence was given that the plaintiff was bitten by a bulldog belonging to the defendant. There was no evidence that the dog had previously bitten or attempted to bite any person; but there was evidence that whilst in the possession of a former owner it had, in company with another dog, chased and worried a goat, and that the defendant knew that it had so done. The county court judge found that the dog was ferocious to the defendant's knowledge, and gave judgment for the plaintiff with damages.

The defendant appealed.

Brooke Little, for the defendant. There was no evidence of scienter to make the defendant liable. It was not enough to shew that the dog to the defendant's knowledge had previously attacked another animal; it was necessary to shew that it had previously bitten or attempted to bite mankind. In *Applebee* v. *Percy* (1) the point did not arise, but Brett J. in his judgment (2) states the law thus: "Where the animal belongs to a class which is not habitually ferocious, it is necessary to shew that its owner has notice that it has on former occasions shewn symptoms of a disposition to bite mankind." In *Beck* v.

(1) L. R. 9 C. P. 647. (2) L. R. 9 C. P. 650.

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Dyson (1) Lord Ellenborough, at nisi prius, directed a non-suit where there was no proof of the dog having bitten any other person than the plaintiff. The allegation in the form of declaration given in Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 366, is, "that the defendant wrongfully kept a dog of a fierce and mischievous nature and accustomed to bite mankind." *Worth* v. *Gilling* (2) was a decision that proof that the dog had attempted to bite mankind is enough. In the case of a dog worrying cattle or sheep the necessity of proving scienter is expressly taken away by statute—28 & 29 Vict. c. 60, s. 1.

Hawtin, for the plaintiff. It was a question of fact for the judge whether scienter was established or not, and he has found that the dog was ferocious to the defendant's knowledge. The ferocity need not be only towards mankind. The expression used in 28 & 29 Vict. c. 60, s. 1, is "mischievous propensity," and it is submitted that it is sufficient, where the dog has bitten a man, to shew that he had previously displayed a mischievous propensity. In *Worth* v. *Gilling* (2) the declaration as originally drawn appears not to have alleged that the dog was "accustomed to bite mankind," though it was afterwards amended, probably ex majori cautelâ, by adding that allegation. [He also referred to *Smith* v. *Great Eastern Ry. Co.* (3)]

LORD RUSSELL of KILLOWEN C.J. I am of opinion that this appeal should be allowed. [His Lordship stated the facts.] There was no evidence before the learned county court judge that the dog had on any previous occasion manifested any tendency to bite mankind. It never had bitten or attempted to bite anybody; its record was quite clean except for the unhappy incident of the goat. Was the judge entitled to arrive at the conclusion that the defendant was liable? That leads to the question, Was there sufficient evidence of scienter to make the defendant liable? I think there was not. I do not say that the law is in a satisfactory condition; I think it is

(1) 4 Camp. 198. (2) L. R. 2 C. P. 1.
(3) L. R. 2 C. P. 4.

unsatisfactory. It would, in my opinion, be more in accordance with sound reason and principle to make a man responsible for what his dog did—that he should take the risk of keeping it. We have not, however, to decide whether the law in this respect is satisfactory or unsatisfactory , but only to say what it is as applied to the particular case before us. If a dog bites sheep or cattle the owner is, by Act of Parliament, liable although he had not the least reason to suppose his dog had any tendency to bite sheep or cattle. An attempt was made in the House of Commons some years ago to abolish the doctrine of scienter, but that attempt was unsuccessful. It is impossible, looking at the long series of cases, extending over many years, in which the doctrine of scienter has been applied and acted upon, to arrive at any other conclusion than that, in actions for injury sustained by man through the bite of a dog, the scienter which it is necessary to shew is that the dog had a ferocious disposition towards mankind—that he had bitten or attempted to bite mankind. In the present case the county court judge has not found that the dog, before it bit the plaintiff, had any ferocious disposition towards mankind; he has only found that it was ferocious, and ferocious to the knowledge of the defendant. As I have said, there was no evidence upon which it could be found that the dog had previously bitten or attempted to bite mankind. I am, therefore, of opinion that the judgment was wrong.

WILLS J. I am of the same opinion. In actions for injury from the bite of a dog it was, for a great many years when pleadings were required to be more exact than now, thought necessary to describe the dog in the declaration as not merely of a ferocious nature but as "accustomed to bite mankind." In *Worth* v. *Gilling* (1), for instance, that allegation was added by leave of Willes J. by way of amendment at nisi prius, shewing that it was thought to be an allegation necessary to support the cause of action. In those days, when pleadings were more strict, the declaration probably contained a true statement of the law, and what was alleged it was necessary to prove. In *Hartley*

(1) L. R. 2 C. P. 1.

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v. *Harriman* (1) Lord Ellenborough C.J. (2) said: "unless it be inferred that a dog accustomed to attack men is ipso facto accustomed also to attack sheep, there is no evidence to support this declaration." If the question were, Is it to be inferred that a dog accustomed to attack sheep is ipso facto accustomed also to attack men? I should answer it in the negative, because everybody, I think, who knows anything about dogs must know that a great many of them will attack any living thing except man. In this case there was no evidence that the dog had shewn a ferocious disposition towards man. I can imagine cases in which a dog had shewn a disposition so generally hostile to man that it might be inferred that the dog was ready to bite mankind though it never had done so. But the only evidence here was that the dog had on one occasion when in company with another dog chased and worried a goat. That is not sufficient to establish the necessary scienter, and I am, therefore, of opinion that the plaintiff was not entitled to succeed in his action.

Appeal allowed.

Leave to appeal was given.

Solicitors for appellant: *Thomson & Co.*

Solicitor for respondent: *A. H. D. Nonweiler.*

(1) 1 B. & A. 620. (2) 1 B. & A. at p. 624.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1896
June 15.

CARTER AND OTHERS *v.* RIGBY & CO.

Practice—Joinder of Plaintiffs—Several Causes of Action—County Court Rules, 1889, *Order* III., *r.* 1; *Order* XLIV., *r.* 18—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 6, *sub-s.* 3.

Order XLIV., r. 18, of the County Court Rules does not enlarge the power of joinder of plaintiffs given by Order III., r. 1, nor allow of persons being joined as plaintiffs in actions under the Employers' Liability Act who could not have been so joined in actions of other kinds.

By the flooding of a mine of the defendants fifty miners, who were in their employment, were drowned. Thereupon fifty persons, being relatives respectively of the deceased miners, joined in bringing an action in the county court against the defendants under Lord Campbell's Act and the Employers' Liability Act in respect of their deaths, which were alleged to have been caused by the negligence of the defendants or their servants:—

Held, affirming the judgment of the Queen's Bench Division, that, as their causes of action were several, they could not be joined in one action.

APPEAL from the county court of Staffordshire.

On January 14, 1895, a number of miners employed by the defendants at their colliery, known as the Diglake Colliery, lost their lives owing to a sudden flooding of the seam in which they were working. On January 13, 1896, the plaintiffs, fifty in number, being respectively the widow or parent of one or other of fifty of the deceased miners, jointly commenced an action in the county court against the defendants, under Lord Campbell's Act and the Employers' Liability Act, 1880, for damages for the injury sustained by them in consequence of the deaths of their respective relatives, which deaths they alleged to have been caused by reason of defects and negligence of the kinds specified in sub-ss. 1, 2, and 3 of s. 1 of the last-mentioned Act.

The defendants applied to the county court judge to strike out forty-nine of the plaintiffs on the ground that the County Court Rules did not authorize the joinder of several plaintiffs suing in respect of several causes of action.

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The judge dismissed the application. The defendants appealed.

Jelf, Q.C., and *H. T. Boddam*, for the defendants. The plaintiffs are suing, not in respect of one cause of action in which they are jointly interested, but each in respect of a several cause of action. Under such circumstances they cannot be joined.

Order III., r. 1, of the County Court Rules, 1889 (1), which deals with the joinder of parties, is in precisely the same language as the corresponding rule in the Supreme Court, Order XVI., r. 1. And although at one time it was thought that under the Supreme Court rule two or more persons might join as plaintiffs in one action in respect of several causes of action—*Booth* v. *Briscoe* (2)—it has now been settled that they can not so join: *Smurthwaite* v. *Hannay*. (3) And it makes no difference in this respect that the several causes of action arise out of one and the same wrongful act: *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*. (4)

The same construction must be put upon the language of both rules. It may be that s. 6, sub-s. 3, of the Employers' Liability Act, 1880 (5), was intended to give a power to frame

(1) By Order III., r. 1, of the County Court Rules, 1889, "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to any extra costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct."

By Order XLIV., r. 18, "Where two or more persons are joined as plaintiffs under Order III., r. 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the Court may think fit."

(2) 2 Q. B. D. 496.

(3) [1894] A. C. 494.

(4) [1895] A. C. 661.

(5) By s. 6, sub-s. 3, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), "For the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules

rules allowing a joinder of causes of action under that Act beyond what is allowed in other kinds of actions; but, if so, the power has not been exercised.

Bigham, Q.C., and *C. A. Russell*, for the plaintiffs. It may be that Order III., r. 1, of the County Court Rules, read alone by itself, does not permit a joinder of several plaintiffs in respect of several causes of action; but, having regard to the language of Order XLIV., r. 18, of the same rules, an extended meaning must be given to it in its application to actions under the Employers' Liability Act. For unless the draftsman intended to authorize such a joinder as that in the present case, it is difficult to attach any meaning to the provision of the latter rule, that "where two or more persons are joined as plaintiffs . . . . the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment." That language implies that the parties so joined have several causes of action. That rule, which applies only to actions under the Employers' Liability Act, was evidently made in the exercise of the power given by s. 6, sub-s. 3, of that Act.

Jelf, Q.C., in reply. Order XLIV., r. 18, does not profess to give any power of joinder at all: it merely says what is to happen in cases in which plaintiffs are joined under Order III., r. 1. It cannot be interpreted as enlarging the provisions of the latter rule. The provision in Order XLIV., r. 18, as to the distribution of the money recovered and of the costs may be explained by supposing it to refer to actions brought under Lord Campbell's Act Amendment Act (27 & 28 Vict. c. 95), by s. 1 of which, in the event of no action being brought by the executor of the person killed, or in the event of there being no executor, the action may be brought by the persons beneficially interested themselves. Such persons have but one cause of action between them, namely, the death of their deceased relative, though they are severally interested in the result. This fits in with the

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and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts."

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language of r. 18, which speaks of "the cause of action" in the singular; whereas the construction of the plaintiffs does not, for their causes of action are several.

Cur. adv. vult.

June 2. The judgment of the Court (Lord Russell of Killowen C.J. and Wright J.) was read by

LORD RUSSELL of KILLOWEN C.J. The question in this case is whether a number of plaintiffs can be joined in one action against one defendant in the county court for damages under Lord Campbell's Act and the Employers' Liability Act, 1880, where the same negligence is alleged to have caused the death of several persons. The county court rule dealing with joinder of plaintiffs is Order III., r. 1, which is as follows: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to any extra costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct."

This rule is in exactly the same terms as Order XVI., r. 1, of the Supreme Court Rules. In *Smurthwaite* v. *Hannay* (1) the House of Lords decided that such a joinder was not allowable under Order XVI., r. 1, of the Supreme Court Rules. Is there any reason why that decision does not apply to the interpretation of the County Court Rules? It is said that the Employers' Liability Act, 1880, s. 6, gave power to make rules authorizing such a joinder. This seems to me open to grave doubt. Sect. 6, sub-s. 3, of the Act says that for the purpose of consolidating actions and otherwise preventing multiplicity of such actions, rules and regulations may be made in the same manner as rules for regulating the practice in other county court actions. I doubt whether this gives any greater power in the case of Employers' Liability actions than in other actions. Rules as to

(1) [1894] A. C. 494.

their consolidation, and otherwise preventing multiplicity of suits, may be made as in the case of other actions: that is all the section amounts to in my opinion. Order VIII. of the County Court Rules deals with consolidation, and seems to me to give effect to the object of s. 6 of the Employers' Liability Act, 1880, above referred to.

But even assuming this section to authorize rules permitting such a joinder, the more important question remains, Do these rules as drawn up permit such a joinder? It is contended that the joint effect of Order III., r. 1, and Order XLIV., r. 18, is to authorize such joinder. Order XLIV., r. 18 is as follows: "Where two or more persons are joined as plaintiffs under Order III., r. 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the Court may think fit." I am not clear that the words of the rule may not be satisfied by cases in which (as under the Act of 1864 amending Lord Campbell's Act) several plaintiffs may be joined. But take the other view suggested, namely, that the rule assuming (although wrongly) that this power of joinder exists under Order III., r. 1, therefore the joint effect of the two rules is to authorize such joinder. This reasoning is fallacious. The question must be, Does Order III., r. 1, allow the joinder? If it does not (and *Smurthwaite* v. *Hannay* (1) is a decision to that effect), then a mistaken view to the contrary effect expressed in other rules cannot add to its operative force or justify other than its proper construction. But more, this reasoning would lead to this strange result: Inasmuch as Order XLIV. deals only with the Employers' Liability Act, rule 18 of that order can be read with Order III., r. 1, only in connection with actions under that Act; and therefore Order III., r. 1, would have to be interpreted in conformity with *Smurthwaite* v. *Hannay* (1) in all other actions. In other words, in the two cases put, the same words

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Lord Russell C.J.

in the same Order III., r. 1, would have to receive different constructions. I come to the conclusion, therefore, that the joinder of plaintiffs here attempted cannot be allowed. I am sorry to feel obliged to come to this conclusion, for although I cannot doubt that *Smurthwaite* v. *Hannay* (1) was rightly decided, I think it in every way desirable that Order III., r. 1, should be so framed as to permit such a joinder as that here in question, subject to the control of the Court where inconvenience or injustice might arise from following that course, and I hope that the Rule Committee may see fit to amend Order III., r. 1, so that it may rightly bear the construction the Master of the Rolls put upon the corresponding Supreme Court rule in *Hannay* v. *Smurthwaite*. (2)

Appeal allowed.

J. F. C.

The plaintiffs appealed.

1896. June 15. *Bigham, Q.C.*, and *C. A. Russell*, for the plaintiffs. In *Smurthwaite* v. *Hannay* (1) the House of Lords did not overrule *Booth* v. *Briscoe* (3), in which case a joint action for libel was allowed. Nor did the House of Lords deal with cases under the Employers' Liability Act, 1880. Sect. 6 of that Act contemplates the consolidation of actions to prevent multiplicity and the making of rules to effect that purpose. Rules 18 and 19 of Order XLIV. of the County Court Rules, 1889, are meaningless unless they apply to such a case as the present one. It is true that there is no rule which expressly says that such plaintiffs may join in one action; but the County Court Rules must be read as if Order III., r. 1, were repeated in Order XLIV., which is under the heading "The Employers' Liability Act, 1880." The same rule can be read differently according to the subject-matter with which it is dealing, and, so far as concerns actions under the Employers' Liability Act, Order III., r. 1, should be taken in conjunction with rules 18 and 19 of Order XLIV. as authorizing the joinder of all persons whose right to relief arises, as in this case, out of the same occurrence.

(1) [1894] A. C. 494. (2) [1893] 2 Q. B. 412.
(3) 2 Q. B. D. 496.

Jelf, Q.C., and *Ellis Hill*, for the defendants. The test of whether joinder of actions should be allowed is not whether the causes of action arise out of the same occurrence, but whether there is one cause of action. Whether or not there is power to make rules to permit the joinder of such actions as the present, that power has not been exercised. Rules 18 and 19 apply only to cases where two or more persons are joined as plaintiffs under Order III., r. 1, and the interpretation of that rule is governed by the decision of the House of Lords in *Smurthwaite* v. *Hannay* (1) on the similar Supreme Court rule, Order XVI., r. 1.

C. A. Russell, in reply.

LORD ESHER M.R. I am of opinion that the judgment of the Divisional Court was right. We are bound by the decision of the House of Lords in *Smurthwaite* v. *Hannay* (1), whatever difficulties it may have given rise to. That decision was given on Order XVI., r. 1, of the Rules of the Supreme Court, which is in precisely the same terms as Order III., r. 1, of the County Court Rules, 1889. The interpretation, therefore, that we must put on this latter rule is that it does not authorize the joinder of the plaintiffs in this action, although the matter which is alleged against the defendants, and which gave rise to all the actions, was the same in each case. It is said that this construction makes rule 18 of Order XLIV. meaningless; but the answer to that objection is that the last-mentioned rule by its express terms cannot take effect except in cases where persons have been joined as plaintiffs under Order III., r. 1. That is the condition upon which all the provisions of the rule depend, and if there are no such plaintiffs there is nothing to which the rule can apply. There is no question of interpreting Order III., r. 1, by means of the context, or by inquiring what was the intention of the makers of the rule. The House of Lords has put a construction upon it, and we cannot go beyond or behind that decision.

The plaintiffs cannot be joined in this case, and the appeal must be dismissed.

(1) [1894] A. C. 494.

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KAY L.J. This action is brought by the representatives of fifty deceased persons who were drowned by the flooding of the defendants' mine. The question is whether those separate causes of action in respect of the death of each of the miners can be joined in one action. In 1880 the Employers' Liability Act of that year treated, in s. 6, of the making of rules for the purpose of consolidating actions under that Act in the county court, and otherwise preventing multiplicity of such actions. Rules were made under that Act and incorporated in the County Court Rules, 1889. Order XLIV. of these rules is headed "The Employers' Liability Act, 1880," and it seems to me that it was certainly contemplated that several causes of action by several persons could be joined in one action, though this is not expressly stated. I do not think that the words of the rule would be satisfied by applying them to the case where several persons may be suing for compensation to which they are entitled in different proportions on the death of one person; and I am confirmed in that opinion because at the time when the rules were made there was a considerable body of authority that in the High Court there might be a joinder of separate causes of action in different persons. It has now been decided in the House of Lords in *Smurthwaite* v. *Hannay* (1) that the joinder of several plaintiffs is only authorized when they have one cause of action; and it follows that Order III., r. 1, of the County Court Rules, 1889, does not empower the plaintiffs in this case to join their several causes of action. There can be no distinction between the interpretation of Order XVI., r. 1, of the Supreme Court Rules and the identical Order III., r. 1, of the County Court Rules.

It was argued for the plaintiffs that although in general Order III., r. 1, would not permit a joinder such as that in the present case, yet in actions under the Employers' Liability Act, Order III., r. 1, and Order XLIV., rr. 18, 19, must be read as a separate code. This, however, is not a legitimate mode of using the context, for the effect would be to give to the same rule one meaning in one set of actions, and another meaning in another set. Order XLIV. does not profess to alter Order III., r. 1.

(1) [1894] A. C. 494.

It assumes that Order III. authorizes such an action, but the House of Lords has held that it does not. I feel that we are bound to interpret Order III., r. 1, according to the decision of the House of Lords on Order XVI., r. 1, of the Supreme Court Rules, and that this appeal cannot succeed.

A. L. SMITH L.J. Order XVI., r. 1, of the Rules of the Supreme Court deals with the case of persons joined as plaintiffs in whom the right to the relief claimed is alleged to exist, whether jointly, severally, or in the alternative. In 1877 it was decided that an action of libel could be brought by two or more persons jointly as plaintiffs, for the same libel, against the same defendants. In 1880 came the Employers' Liability Act, which enacted that for the purpose of consolidating actions under that Act in county courts, and otherwise preventing multiplicity of such actions, rules might be made regulating the practice and procedure with regard to such actions. Order III., r. 1, of the County Court Rules simply copied Order XVI., r. 1, of the Supreme Court Rules; and Order XLIV. contains rules under the heading "Employers' Liability Act," which were intended to carry out the powers given by that Act. When these rules were drawn there was the decision of this Court in *Booth* v. *Briscoe* (1), and it was obviously thought that what had been done in that case could be done in other actions of tort. But in 1894 came *Smurthwaite* v. *Hannay* (2), in which the House of Lords said this joinder of plaintiffs was wrong. I read that decision as applying to both contract and tort, and if there were any doubt about this I need only refer to the *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (3), which was a case of tort. So far, then, it would appear that Order III., r. 1, of the County Court Rules does not authorize such a joinder of causes of action as has been attempted here. It is said, however, that the county court judges, having power to make rules under the Employers' Liability Act for the joinder of plaintiffs, have done so, and so they have; but I cannot read rule 18 of Order XLIV., since the case in the House of Lords,

(1) 2 Q. B. D. 496. (2) [1894] A. C. 494.
(3) [1895] A. C. 661.

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A. L. Smith L.J.

as giving the power of joinder, independent of the limitation at the commencement of the rule that it is to apply to the cases where two or more persons are joined as plaintiffs under Order III., r. 1. It is impossible to read Order III., r. 1, as meaning one thing when applied to actions under the Employers' Liability Act, and another when applied to other actions.

Appeal dismissed.

Solicitors for plaintiffs: *Preston, Stow & Preston, for Hollinshead & Moody, Tunstall.*

Solicitors for defendants: *Watson, Sons & Room.*

A. M.

1896 *April* 21.

In re PHILLIPS. *Ex parte* THE TREBOETH BRICK COMPANY.

Bankruptcy—Practice—Appeal from Receiving Order—Application to increase Security for Costs—"Special Circumstances"—The Bankruptcy Rules, 1886, *r.* 131.

Where a debtor appeals from a receiving order made against him and lodges in court the sum of 20*l.* prescribed by rule 131 as security for the costs of the appeal, the fact that the respondent's costs of the appeal out of pocket will alone exceed 20*l.* is not a special ground for increasing the amount of the deposit.

In re McHenry (17 Q. B. D. 351) distinguished.

THIS was a motion asking that the deposit of 20*l.* paid into court by the debtor, upon entering an appeal from the receiving order made against him, might be increased to 50*l.*

A receiving order had been made against the debtor in the county court of Swansea on the petition of the liquidator of the above-named company. The petition had been heard on vivâ voce evidence. The debtor appealed against the receiving order and, on entering his appeal, lodged in court the usual deposit of 20*l.*, as security for the costs of the appeal, pursuant to rule 131 of the Bankruptcy Rules, 1886, which provides: "At or before the time of entering an appeal the party intending to appeal shall lodge in the High Court the sum of 20*l.* to satisfy, in so far as the same may extend, any costs that

the appellant may be ordered to pay. Provided that the Court of Appeal may in any special case increase or diminish the amount of such security, or dispense therewith."

S. T. Evans, for the motion. The petitioning creditor is a company in liquidation, and some eight witnesses were examined in support of the petition. The deposit will not nearly cover the liquidator's costs of the appeal. The out of pocket expenses in bringing up the witnesses from Swansea will alone amount to about 20*l*. These facts, it is submitted, are "special circumstances" for increasing the amount of the security. In the case of *In re McHenry* (1) a bankrupt was ordered to increase the deposit by the amount of 100*l*.

M. R. White (solicitor) represented the debtor.

VAUGHAN WILLIAMS J. It is not usual to increase the amount of the deposit in cases where it is the debtor who is appealing from the receiving order made against him, and for this reason. A receiving order entirely changes the status of a debtor, and the tendency of the Courts is to afford him every facility in prosecuting an appeal from the order. To increase the deposit, except on very special grounds, might considerably increase his difficulties. *In re McHenry* (1) does not apply. It was not an appeal from an order of adjudication. There, adjudication had taken place, and the bankrupt was contesting the proofs of parties with whom he had been engaged in long and profitless litigation. In this case I do not see any special circumstances to justify me in making the order that is asked for. The application must be dismissed.

Solicitors: *Riddell & Co.; R. White.*

(1) 17 Q. B. D. 351.

H. L. F.

1896
May 8, 9.

TRUSTEE OF THE PROPERTY OF LORD HILL, DECEASED *v.* ROWLANDS.

Bankruptcy—Act of Bankruptcy—Non-Trader—Notice of Intention to suspend Payment—Solicitor's Letter—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

Sect. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, which enacts that a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts, applies to non-traders as well as to traders.

Judgment creditors having pressed the debtor for payment and threatened to levy execution, he offered them a second mortgage on his freehold estates as security, and with a view thereto his solicitors wrote to the solicitors of the judgment creditors as follows: "As promised we send you herewith statement showing income and expenditure and amount of the mortgages on the estates. We think it well to repeat what we stated to you at our interview that a receiving order will be applied for immediately execution is issued." The security offered was declined, and shortly afterwards the judgment creditors issued execution. The debtor at once presented a bankruptcy petition and obtained a receiving order. The trustee in bankruptcy claimed moneys paid to the debtor's solicitor between the date of the letter and of the receiving order, on the ground that the letter was an act of bankruptcy and that his title related back thereto:—

Held, that the letter did not amount to a notice of suspension or of intention to suspend payment, and therefore was not an act of bankruptcy.

THIS action raised the question whether a letter written by the solicitors of a judgment debtor, a non-trader, to the solicitors of certain judgment creditors, constituted an act of bankruptcy within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883.

During 1893 and 1894 Lord Hill, who was tenant for life of certain settled estates and also owner in fee simple of certain unsettled estates in Shropshire, was in money difficulties. In 1893 the Somerset trustees, who were mortgagees of some of his Shropshire estates, took proceedings to realize their mortgage, which was an insufficient security, and obtained judgment against Lord Hill for 14,900*l.* on his personal covenant in the mortgage deed. They pressed for payment and threatened to levy execution at Hawkstone, the residence of Lord Hill.

Negotiations ensued between Mr. Rowlands, the solicitor of Lord Hill and a member of the firm of Rowlands & Son, and Messrs. Hulberts & Hussey, the solicitors of the Somerset trustees. Lord Hill was anxious that the Somerset trustees should accept a second mortgage on certain of his estates, which would be a sufficient security for the deficiency owing to them on their mortgage. On May 29, 1894, a meeting took place between Mr. Rowlands and Messrs. Hulberts & Hussey, at which it was arranged that Mr. Rowlands should write to them with a statement of Lord Hill's position, and accordingly on June 4, 1894, Messrs. Rowlands & Son wrote Messrs. Hulberts & Hussey the following letter:—

"Lord Hill and Somerset Trustees.

"As promised we send you herewith statement showing the income and expenditure and the amount of the mortgages on the estates.

"We think it well to repeat what we stated to you at our interview that a receiving order will be applied for immediately execution is issued."

The account that was inclosed in the letter shewed a net credit of 1400*l.* per annum after providing for interest on all mortgages and charges. Mr. Rowlands had no specific instructions from Lord Hill to write the letter of June 4, 1894, but had general instructions to make the best terms he could with the Somerset trustees. The offer of a second mortgage was declined, and, after some further fruitless negotiations, the Somerset trustees levied execution at Hawkstone on July 18, 1894. The next day Lord Hill presented a bankruptcy petition in the county court at Shrewbury and a receiving order was made, and on August 25 following he was adjudicated bankrupt. He died in March, 1895. Between June 4 and July 19, 1894, Mr. Rowlands received rents of Lord Hill's estate amounting to about 3000*l.*, which, by the direction of his Lordship, were applied in discharge of various liabilities.

The plaintiff was the trustee in bankruptcy of the property of Lord Hill, and sought by the present action to enforce payment of the 3000*l.* from Mr. Rowlands on the ground that the letter

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of June 4, 1894, was an act of bankruptcy and that his title as trustee in bankruptcy related back to that date.

Muir Mackenzie and *A. J. David*, for the plaintiff. Sect. 4, sub-s. 1 (*h*), of the Act applies to non-traders as well as to traders: *In re Scott.* (1) The letter was an act of bankruptcy. It was equivalent to a notice that Lord Hill had suspended or was about to suspend payment of his debts. The test is, how would the creditors who received the letter regard it? In substance it says this: "I cannot pay. I make you an offer. If you refuse I go into bankruptcy." The case falls within the principle of *In re Lamb* (2); *In re Daintrey* (3); *In re Entwistle* (4); *Crook* v. *Morley* (5); *Ex parte Oastler* (6); *In re Wolstenholme* (7); *In re Simonson.* (8) After sending the letter Lord Hill was bound to hold his hand. If he had then given a bill of sale to another creditor it would have been a fraudulent preference.

Channell, Q.C., *W. Graham*, and *Rowlands*, for the defendant, were not called upon.

VAUGHAN WILLIAMS J. I think this letter of June 4, 1894, does not amount to an act of bankruptcy. It is said to be an act of bankruptcy within clause (*h*) of sub-s. 1 of sect. 4 of the Bankruptcy Act, 1883, which enacts that it is an act of bankruptcy if a debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts. In my judgment this letter does not amount either to a notice of suspension or a notice of intention to suspend payment. In considering the letter one must consider what, having regard to all the circumstances which were in the knowledge of the writers and of the recipients, the recipients would understand the letter to mean. It is said that the letter means, "I am unable to pay my debts, and if you do not accept the offer or suggestion made in the letter I shall have immediately to suspend payment." Now, I agree with Mr. Mackenzie that,

(1) [1896] 1 Q. B. 619.
(2) 4 Mor. 25.
(3) [1893] 2 Q. B. 116.
(4) 65 L. T. (N.S.) 349.
(5) [1891] A. C. 316.
(6) 13 Q. B. D. 471.
(7) 2 Mor. 213.
(8) [1894] 1 Q. B. 433.

if the letter did mean to intimate that unless the recipients accepted the offer or suggestion in the letter the debtor would have no alternative but to suspend payment, that would be an act of bankruptcy within the meaning of this clause (*h*). But it does not seem to me that the letter says anything of the sort. One must recollect what the position of these parties was. Lord Hill was the owner of very large estates, some of them settled estates in respect of which he had only a life interest, some of them unsettled estates; and in this letter it is suggested that, having regard to the values of those estates, really a substantial security might be offered to the Somerset trustees for the debt which was due to them. The view apparently taken by those trustees was this: "The estates may, as the basis of a second mortgage, afford a reasonable security for the debt in question, but we cannot help thinking that really if an effort is made the money to pay our debt will be forthcoming, and we think that it might be done in this way: we will put in an execution at Hawkstone, the place where Lord Hill lives." Mr. Rowlands did not agree with that suggestion. He thought that to put in an execution at Hawkstone would, at all events if the goods were sold under a sheriff's sale, result in the sacrifice of a very considerable portion of the value of this large slice of the estate. The suffering execution by seizure and sale of goods would itself be an act of bankruptcy, and the result of that act of bankruptcy would be that the power of Lord Hill's advisers to deal with his creditors and to carry on his affairs would be absolutely taken away. After the committal or the suffering of an act of bankruptcy by execution being put in, a debtor really is placed in such a relation to his creditor that not only cannot he safely offer to pay, but they cannot safely accept any money that he does tender them. If they do accept it, they accept it with the liability to restore it in the event of bankruptcy. Now all that this letter says is: "If you take this ill-judged proceeding of putting in execution, you will necessarily drive Lord Hill to file his own petition as a matter of protection both to himself and to his creditors." But it does not say, and I cannot understand how it can be suggested that it says, that there

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Vaughan Williams J.

will be a suspension of payment if the offer suggested by the letter and the accompanying statement of accounts, that the trustees should accept a second mortgage, was refused. It does not say that in that case Lord Hill is going to suspend payment; and if you go on and read the further correspondence it is perfectly plain that Messrs. Hulberts & Hussey did not so understand it, for they themselves, after this offer had been refused, apparently try to see whether they cannot negotiate some different form of security which might be sufficient to satisfy this claim or to secure it. Under those circumstances there does not seem to me the slightest ground for saying that this letter amounts to a notice of suspension or intention to suspend payment. Most of the cases that have been decided have been cases where a trader has issued a circular to his creditors and makes them some offer, and really whenever that is done the debtor says to his creditors, "I will hold my hand while you are considering this offer, and I will not resume payment unless you at your meeting come to a conclusion that I ought to do so." All those cases, I am happy to say, if you leave out the first case of *Ex parte Oastler* (1), form a sequence of cases which are remarkably consistent—much more consistent than one generally finds in the construction of a difficult Act of Parliament like this. But those cases only to a slight extent touch the present one. They do touch the present one, I think, so far as to decide that where a letter does really say that the debtor is unable to pay his debts and makes an offer and intimates that unless that offer is accepted he will have no alternative but to suspend payment, that is an act of bankruptcy. I should therefore, in the case of this letter, hold it to be an act of bankruptcy within the section if I had arrived at the conclusion that it had that meaning. But it seems to me to mean nothing of the sort. The letter does not say that, if the offer is not accepted, Lord Hill will have no alternative but to go into bankruptcy. All it does is to make an offer; but it leaves plenty of room for counter offers and discussions. It however warns the creditors, the Somerset trustees, that it will be a very ill-judged proceeding on their part if they put in

(1) 13 Q. B. D. 471.

an execution, because not only would it be likely to lead to a sacrifice of a considerable portion of the estate, but also it would, by being an act of bankruptcy, put Lord Hill in a position that he really would not be able, however much he wished it, to go on making payments. I therefore give judgment for the defendant with costs.

Solicitors for plaintiff: *Pritchard, Englefield & Co.*
Solicitors for defendant: *Stibbard, Gibson & Co.*

H. L. F.

PERTWEE *v.* TOWNSEND.

1896
June 17.

Rent-charge—Augmentation of Benefice—Charge upon Land—Release of Part of Land—Liability of Tenant of Residue—29 Car. 2, c. 8.

An augmentation had been granted under 29 Car. 2, c. 8, "An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies," and charged upon land, and a portion of such land was held by the defendant, as tenant for life in possession, having been acquired by the defendant's predecessors under a contract, whereby they released the residue of the land from the burden of the charge, and indemnified the owners against it.

In an action to recover from the defendant the whole amount of the arrears of the charge:—

Held, that the defendant was liable for the whole amount, notwithstanding that the annual profits of his land fell short of the amount of the charge.

ACTION to recover the sum of 80*l.*, being one year's arrears of an augmentation granted by the Bishop of London to the vicar of Brightlingsea and his successors under the Acts 29 Car. 2, c. 8, and 1 & 2 Will. 4, c. 45, and charged upon certain lands in Essex, of a portion of which the defendant was tenant for life in possession and actual occupation.

The facts are stated in the judgment.

The action was tried before Collins J. without a jury.

C. E. Jones, for the plaintiff.

Channell, Q.C., and *Wedderburn*, for the defendant.

Cur. adv. vult.

June 17. The following written judgment was delivered by

COLLINS J. This is an action to recover 80*l.*, being one year's arrears of an augmentation granted by the Bishop of

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London to the vicar of Brightlingsea and his successors under the Acts 29 Car. 2, c. 8, and 1 & 2 Will. 4, c. 45, and charged upon certain lands in Essex, of a portion of which the defendant is tenant for life in possession and actual occupation.

The portion in question was acquired by the defendant's predecessors under a contract, whereby they released the residue of the land from the burden of the charge, and indemnified the owners against it. The defence is that the annual profits of the land fall far short of the amount of the charge, and that in point of fact a sum of 7*l.* 5*s.* is all that is available to meet the arrears now due, and that sum was paid into court under Order XIV. as a condition of defending the action. It was not disputed that the action lies against the defendant, but it was contended by Mr. Channell that his liability is to be measured by the annual profits, and that he cannot be called upon to pay more. The precise point does not seem ever to have been raised in England, but Mr. Channell cited in support of his contention a decision of the Vice-Chancellor of Ireland, and two dicta of members of the Court of Appeal in this country, which seemed to some extent to countenance it.

I took time therefore to look into the authorities.

The material words of the statute, 29 Car. 2, c. 8, s. 1, are as follows: "And the same" (i.e. the charge) "shall for ever hereafter be taken, received, and enjoyed by the said vicars and curates and their successors, as well during the continuance of the term or estate, upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards; and the said vicars and curates shall have remedy for the same, either by distress upon the rectories impropriate or portions of tithes (1) charged therewith, or by action of debt against that person who ought to have paid the same."

An action of debt for the arrears lies therefore against the defendant.

On what principle, then, is the amount recoverable to be reduced below the amount claimed as a debt?

In *Swift* v. *Kelly* (2) the Irish Court decided that a terre

(1) Extended to other lands by the later Act, 1 & 2 Will. 4, c. 45.

(2) 24 L. R. (Ir.) 107; reversed 24 L. R. (Ir.) 478.

tenant was liable in debt for the whole amount of the arrears of a charge during his tenancy, without reference to the value of the annual profits of the land. The case was reversed on appeal, on the ground that the defendant was not legally the terre tenant by reason of the effect of an outstanding term vested in trustees, but no doubt was cast on the view taken by the Court below, had the defendant been in point of law pernor of the profits. (1)

In *Odlum* v. *Thompson* (2) Chatterton V.-C. refused to follow the opinion of the Queen's Bench Division in *Swift* v. *Kelly* (3), and held in an action in the Chancery Division that the owner of a charge was not entitled to judgment against the assignees of the land for more than whatever sum, upon account taken, should turn out to have been the amount of the annual profit of the land. The action was for equitable relief, but there was also a specific claim for the amount of the arrears as for a debt at common law. The Vice-Chancellor seems to have founded his opinion to a great extent on the view that, the action of debt being now substituted for the old remedy for a freehold rent-charge by assize of novel disseisin, must be subject to the same limitations, and he seemed to think that the assize of novel disseisin was an action of damages only, such damages being limited to the value of the annual profits withheld, and therefore measured by the amount which might have been received by the owner of the charge had he been in possession. This view, however, seems scarcely consistent with the actual remedy by assize of novel disseisin. This was a mixed action, i.e. partly real and partly personal, and the owner of the charge recovered possession, the arrears of the charge, and damages (see Co. Litt. s. 233), and the remedy therefore was not purely real, i.e. against the land only, but, as to damages, against the chattels also, which could be taken in execution for the amount thereof. On a second disseisin the disseisee recovered double damages. Furthermore, debt always lay for the arrears of a charge for years only, and, being a purely personal action, the chattels of the pernor or terre tenant, and not the

(1) 24 L. R. (Ir.) 478. (2) 31 L. R. (Ir.) 394.
(3) 24 L. R. (Ir.) 107.

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land and the profits thereof only, were liable to make good the debt, just as they would have been in covenant. The debt was for the arrears of the charge, and not for such proportion of it as the annual profits might amount to; so likewise in the case of a rent-charge for life debt lay for the arrears due at the determination of the life interest, and the remedy was personal (see *Leving's Case*, cited in *Thomas* v. *Sylvester* (1)).

The principle is well explained in Gilbert C.B.'s Treatise on the Action of Debt, which forms the appendix to his work on Cases in Law and Equity, p. 370 et seq.: "All feudal rents," he says at p. 370, "arose from plough services, or escuage, turned into a sum certain; and there was no remedy extra feodum . . . . And afterwards, when the plough services were turned into rents, and the uncertain escuage into a sum certain, which made the socage tenure, there was then no other remedy for the rent than was before for the service, and that was upon the land itself, and not by debt upon the person, as the lord had no remedy out of his feud by any action whatsoever. . . .

"And in analogy to this they expounded all rent-charges to be freeholds during the continuance of their estates for conformity of construction; but after the estate of freehold was determined by the act of God, they construed the arrears as debts, because after the freehold became discharged from the duty, the person must be charged, otherwise there would have been no remedy; but during the time that the freehold continued debtor, *no person* was charged in case of the rent-charge, any more than in case of the rent-service."

On the other hand, in the case of chattel interests, the remedy was personal, by debt (without covenant), or by covenant, where one had been made. In such cases clearly the debt was the whole obligation of the rent or charge, and no good reason can be given why in such cases it should extend to the whole charge, but in the case of freeholds be limited to the amount of the profits, the foundation of the right in both cases being the same, namely, privity of estate.

It seems clear to me, therefore, that when *Thomas* v. *Sylvester* (1) removed the doubt as to whether, real actions

(1) L. R. 8 Q. B. 368.

being abolished, debt lay for arrears of a freehold rent-charge, it necessarily followed that the person against whom the action lay was liable personally, quite irrespective of the amount of the annual profits of the land, for the whole debt. The remedy, not the extent of the obligation, was altered.

The dicta, cited in argument, of Cotton L.J. and Kay J., in *Searle* v. *Cook* (1) must, I think, be read in reference to the subject-matter of the claim, which was mainly one for equitable relief. Though, as I have said, the actual point does not seem to have been argued in any English case, it does seem to have been actually decided in *Booth* v. *Smith* (2) by Day and A. L. Smith JJ., and the principle seems to be involved in the decision of *Christie* v. *Barker* (3), where it was held that the owner of part of the land charged is liable in debt to make good the whole charge, having his remedy over against the tenants of the residue. It does not appear whether the amount claimed, which was small, was less or more than the annual profit of the land in the hands of the defendant, but the grounds of the decision shew that this would have been quite immaterial. The question was not raised whether the profits of the whole of the land charged exceeded the amount claimed.

In *Odlum* v. *Thompson* (4) the Vice-Chancellor further relied on the analogy of an executor's position, who has actually entered, and who is sued as assignee of the term, and who is nevertheless allowed to plead that the profits fall short of the rent, and to measure his liability accordingly. But, as pointed out in *Kearsley* v. *Oxley* (5), this plea was really an argumentative traverse of the assignment, and the Court accordingly treated the executor as being in a position somewhat different from that of a complete assignee. But I cannot think that the exceptional position of an executor presents any analogy to that of a complete legal assignee like the defendant in this case.

The Vice-Chancellor's judgment, so far as it rests on the view that, the remedy by debt, being substituted for that by assize of novel disseisin, must be co-extensive with it, has no

(1) 43 Ch. D. 519, at pp. 532, 528, respectively.
(2) 51 L. T. (N.S.) 395.
(3) 53 L. J. (Q.B.) 537.
(4) 31 L. R. (Ir.) 394.
(5) 2 H. & C. 896.

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application to this case, in which the remedy by action of debt or distress was conferred by the statute itself. The debt must be the same sum as that for which the distress might have been levied, namely, the whole amount of the arrears.

On the whole, therefore, I am clearly of opinion that the plaintiff is entitled to judgment for the amount claimed. The defendant holds the land subject to a charge, and he cannot keep the land and refuse to pay the charge. If he does refuse, the remedy against him is personal for the amount of the charge itself.

Judgment for the plaintiff.

Solicitors for plaintiff: *A. H. Hunt & Co.*
Solicitors for defendant: *Gepp & Sons.*

P. B. H.

C. A.

1896

June 16.

[IN THE COURT OF APPEAL.]

RICHMOND HILL STEAMSHIP COMPANY *v.* CORPORATION OF THE TRINITY HOUSE.

Ship—Measurement of Tonnage—Deck Cargo—Horses and Cattle—Light Dues—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.

Horses and cattle are "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876, which provides that, where timber, stores, or other goods are carried as deck cargo, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods.

For the purposes of the computation of such tonnage, the measurement ought to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and ought not to include the shed or pens belonging to the ship in which the animals are confined.

APPEAL by the defendants from judgment of the Lord Chief Justice (1) at the trial before him without a jury, and cross-appeal by the plaintiffs.

The action was to recover back a sum of money paid for light dues.

The facts were as follows. The plaintiffs are the owners of

(1) [1896] 1 Q. B. 493.

the steamship *Richmond Hill*, which is of the net registered tonnage of 2703 tons. The defendants are the collectors of light dues payable by vessels entering the port of London. The *Richmond Hill* on December 7, 1894, arrived in the port of London from New York, having on board a deck cargo consisting of 17 horses and 350 head of cattle carried in covered pens on the deck. The pens were part of the fittings belonging to the ship. In pursuance of the provisions of the Merchant Shipping and other Acts, a surveyor of Her Majesty's Customs boarded the ship for the purpose of ascertaining under s. 23, sub-s. 1, of the Merchant Shipping Act, 1876, the tonnage of the ship, upon which (inter alia) light dues are payable, and measured the deck cargo, consisting of horses, cattle, and cattle-pens, in pursuance of the instructions issued by the Board of Trade dated September, 1876, which were as follows: "The surveyor is to measure along the deck the floor or deck space covered by the cargo at its greatest length and the greatest breadth of the floor or deck space covered by the cargo. He is then to observe and measure the highest point reached by the cargo. He is then to multiply together the greatest length, breadth and height so taken, and to divide the product by 100, and the quotient is to be deemed to be the tonnage of the space. The measurements are to be taken in feet and tenths. The space occupied is to be limited by the extremes of 'straight lines inclosing a rectangular space sufficient to include the goods,' and for the measurement of such space, it is to be remembered, no 'means' such as are mentioned in sub-s. 4 of s. 21 of the Merchant Shipping Act, 1854, are necessary." (1) The surveyor measured the extreme length, breadth, and height of the pens, taking in each case outside measurements, and the figures so obtained when multiplied together and divided by 100 gave a quotient of 328 tons. The defendants demanded from the plaintiffs the sum of 3*l.* 16*s.* 6*d.* for light dues payable in respect of the said 328 tons. The plaintiffs paid the amount under protest, contending that live animals are not goods within the meaning

(1) See this sub-section and s. 29 of the Merchant Shipping Act, 1854, set out in the note to the report of the case in the Court below, [1896] 1 Q. B. 493.

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of s. 23 of the Merchant Shipping Act, 1876, and that in any case a wrong system of measurement was adopted. The action was then brought to recover back the money so paid. The questions raised were (1.) whether the defendants were entitled to charge the plaintiffs with any light dues in respect of the horses, cattle, and cattle-pens as aforesaid carried upon the deck of the *Richmond Hill*; and (2.) whether, if so, the defendants had employed the right system of measurement in ascertaining the amount of such dues. (1)

The Lord Chief Justice held that the horses and cattle carried as deck cargo were goods within the meaning of s. 23 of the Merchant Shipping Act, 1876, but that the measurement ought to have included only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and ought not to have included the shed or pens in which the animals were confined. He therefore gave judgment for the plaintiffs for 1*l*.

Bucknill, Q.C., and *Butler Aspinall*, for the defendants. The pens being necessary for the carriage of the animals, the space occupied by them may according to a reasonable construction of s. 23 be said to be "space occupied by such goods" within the meaning of the section. It is space occupied for the purpose of their carriage. If a carriage or other goods were carried on deck packed in a case, the measurement clearly ought to include the case. The same principle must be applied to animals in pens, the pens being necessary for their carriage.

Holman (*Lawson Walton, Q.C.*, with him), for the plaintiffs.

(1) By s. 23 of the Merchant Shipping Act, 1876, "If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act, 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable. The space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods."

The Merchant Shipping Act, 1876, is repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), but that Act contains provisions substantially the same as those of s. 23 of the former Act. See s. 85.

Horses and cattle are not goods within the meaning of s. 23 of the Merchant Shipping Act, 1876. The words "or other goods" in that section must be read according to the well known rule of construction as meaning only goods ejusdem generis with the goods previously mentioned. At the time when the Act was passed the only kind of cargo ordinarily carried on deck in ships other than home trade ships was wood cargo. By "stores," wooden ship's stores such as spars were meant. The provisions of s. 24 shew that only timber, spars, and other wood goods were contemplated as deck cargo by the Legislature.

The mode of measurement adopted by the defendants was clearly wrong. Sect. 23 provides in terms that the measurement is to be of the space occupied by the goods which are carried as deck cargo. The pens or sheds which belonged to the ship were not part of the cargo, and were of greater height than necessary to contain the animals. The measurement of the outside of the pens included therefore a far larger space than that occupied by the animals themselves.

Bucknill, Q.C., in reply.

LORD ESHER M.R. I am of opinion that the judgment of the Lord Chief Justice is right on both points. The provisions of the 23rd section of the Merchant Shipping Act, 1876, appear to be directed to cases in which a shipowner uses the deck of his ship as if it were the hold by carrying cargo upon it, and so earning freight for such carriage. It would be a strange piece of legislation that, if a shipowner carried timber or other wooden goods on deck, he should pay light dues in respect of them, but that he should not pay those dues in respect of other goods such as bales of cotton, which he might carry on deck, and with regard to which as much benefit would be derived from the lights as in the case of timber or wooden goods. I think that the words "other goods" in the section must have their natural meaning in regard to the subject-matter with which the section was dealing, namely, deck cargo, and must be treated as comprising all goods that may be carried on deck as part of the cargo. Bales of cotton carried in the hold would be goods forming part of the cargo; and why, if carried on deck, should

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Lord Esher M.R.

they not be regarded for the purposes of the section as goods carried as deck cargo? In this case the question arises with regard to horses and cattle. They also are, according to the ordinary use of language, "goods" carried as part of the cargo. I think that we ought to construe the word "goods" as including them and anything else that may be carried as cargo on deck. If we regard the grounds upon which these light dues are made payable, they ought to be payable in respect of these goods just as much as in the case of any goods carried on board a ship as part of her cargo. I therefore think the Lord Chief Justice was right as to the first point.

The second point is as to the proper mode of measuring the addition to be made to the ship's tonnage in respect of these goods. The mode in which the measurement is to be made is laid down by the provisions of the Act of Parliament, which, in the absence of any reason to the contrary, we must construe according to the ordinary meaning of the words used. The Act provides that "all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable." The section does not speak of the space allotted for or used for the purpose of the carriage of the goods, but "the space occupied by such goods," and it goes on to provide that "the space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods." So that it is the space actually occupied by the horses and cattle carried as deck cargo which is to be measured, subject to this qualification, namely, that it is not necessary to measure exactly the space occupied by each part of an animal, the dimensions of which would vary at different parts, but the measurement is to be by straight lines inclosing a rectangular space sufficient to include the animal. Therefore the space to be measured is only that which is reasonably necessary to hold the animal, allowing it due facility for movement. It is not a compliance with the provisions of the Act to take the measurement of a pen or shed larger than is reasonably necessary to hold the animal or animals confined in it, or to

include the space occupied by the pen or shed itself, because the animal does not occupy that space. That appears to be the rule as laid down by the Lord Chief Justice; and he came to the conclusion that in this case the measurement exceeded that of the space which was necessary for the occupation of these horses and cattle. The measurement taken was that of the outside of the shed or pen in which the animals were confined. That shed or pen is not cargo but part of the fittings of the ship itself, and therefore the space occupied by it ought not to be taken into account. For these reasons, in my opinion, the appeal and the cross-appeal both fail.

KAY L.J. The Merchant Shipping Act, 1876, contains certain provisions as to the payment of dues, the object of which appears to be that, where a ship carries deck cargo, the tonnage of the space occupied by that cargo shall be added to the registered tonnage of the ship for the purpose of the calculation of the dues. The first point raised is that the cargo carried on deck in this case, which consisted of horses and cattle, is not within s. 23 of the Act. It is argued that the meaning of the words "other goods" used in that section must, in accordance with the much misunderstood doctrine "noscitur a sociis," be confined to goods made of wood. I do not think that is the true construction of the section. The words are, "timber, stores, or other goods." I cannot see why the meaning of the word "stores" should be confined to things made of wood as suggested. It was argued that "stores" meant in this section ship's stores. If so, it would appear that it must mean stores intended for the fitting out of other ships, because stores belonging to the ship herself would not be cargo; but I do not think that the word has the limited meaning which is suggested. It appears to me to mean stores of any kind carried on deck. Therefore, when one comes to the words "or other goods," there appears to me to be no ground for confining their meaning to wooden goods. It was alleged that, when the Act was passed, the only cargo usually carried on deck in the case of ships other than home trade ships was timber or other wood goods. Assuming that to have been so,

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that may be the reason why timber was specifically mentioned; but I think the Legislature must be taken to have contemplated the possibility that goods other than timber might sometimes be carried as deck cargo, or that it might afterwards become usual to carry other goods as deck cargo, and that this section should receive the widest construction: because, if a shipowner chooses to carry in addition to the ordinary tonnage of his ship other goods in respect of which he benefits by the lights for which dues are charged, there is no reason why he should not pay for that benefit. I therefore agree with the Lord Chief Justice in thinking that there is no reason for limiting the meaning of the words "or other goods" as suggested, or for holding that they do not apply to horses and cattle carried as deck cargo.

The second question is, how the space occupied by the deck cargo is to be measured. Sect. 23 provides that, when the ship carries, as deck cargo, timber, stores, or other goods, "all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable"; and the section does not leave it in doubt what that space is to be, for it goes on to provide that "the space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods." What is the rectangular space sufficient to include horses and bullocks when they form the deck cargo? It must be such a rectangular space as would give them the amount of room reasonably necessary for their carriage as deck cargo. The measurement is not to be of the pen or shed in which they are carried, but of such a rectangular space as I have mentioned. What has been done here is to take the outside measurements of a large shed divided into compartments or pens and roofed over, in which the animals were confined, and to treat that as the space occupied by the horses and cattle carried as deck cargo. Such a mode of measurement clearly could not have been adopted if the shed or pen had not been full, some of the compartments being empty or not fully occupied by cattle. In such a case it would

be impossible to include in the measurement the whole of the space contained in the shed or pen without disregarding the words of the section which not only say that the space occupied by the goods is to be measured, but go on to say how it is to be measured, namely, by taking the rectangular space sufficient to include the goods. I find it impossible to differ from the conclusion arrived at by the Lord Chief Justice on this point, which I had rather put in his words than my own. He says, "What the surveyor in my opinion is bound to do is to measure, not the sheds, but the space occupied by the animals themselves, making reasonable allowance for their free bodily movements." This case is quite different from one in which a case in which goods shipped as deck cargo are contained belongs to the shipper. There the case is itself part of the cargo. It is not possible to say that a shed or pen erected by the shipowner and which is not the property of the cargo-owner is part of the cargo. It is only the tonnage of the space occupied by the goods shipped as deck cargo, measured as the section directs, which can be added to the ship's registered tonnage for the purposes of the section. For these reasons I agree that both the appeals should be dismissed.

A. L. SMITH L.J. I am of the same opinion. There are two questions in this case. The first is whether deck cargo consisting of horses and cattle is within s. 23 of the Merchant Shipping Act, 1876. The second is whether, if it is, the space occupied by such horses and cattle has or has not been measured in accordance with the provisions of that section. The Lord Chief Justice has held that horses and cattle are goods within the section, and secondly, that the mode of measurement adopted by the defendants was wrong.

The first point depends upon the construction to be put upon s. 23 of the Merchant Shipping Act, 1876. That section and s. 24 are under the heading "Deck cargoes," and such cargoes are the subject-matter with which the two sections deal. Sect. 23 applies in terms to all cases in which a ship, other than a home trade ship, carries as deck cargo timber, stores, or other goods. It is contended that the well known ejusdem generis doctrine applies, and that the meaning of the words "other goods" must

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A. L. Smith L.J.

be restricted to wooden goods, and therefore does not include horses or cattle. According to the natural meaning of the words they would include any goods other than timber or stores carried as deck cargo. Assuming it to be true, as alleged, that wood cargo was the only kind of cargo usually carried on deck in the case of ships other than home trade ships when the Act was passed, and therefore possibly a deck cargo of animals was not specifically contemplated by the Legislature in passing s. 23, such a deck cargo nevertheless comes within the scope of the section, and I do not see why the meaning of the words should be cut down as suggested, so as to exclude it. I think the words "or other goods" must be construed according to their natural meaning as including any goods other than timber or stores carried as deck cargo.

With regard to the second point, i.e., as to the measurement of the space occupied by the deck cargo, what the surveyor has done is this. He has measured the extreme length, breadth, and height of the pens in which the animals were confined, taking the outside measurements. The defendants contend that this mode of measurement was correct according to the section. It has been pointed out that that cannot be so, because the Act expressly provides that the space occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods. The measurement was taken, in this case, irrespectively of the area occupied by the goods, because the space occupied by the pens themselves, which are not part of the deck cargo, was included in the measurement. I agree on this point with the judgment of the Lord Chief Justice, who held that the measurement must be by taking the rectangular space occupied by the animals themselves. As he pointed out, that measurement cannot be exactly accurate, and must be made to some extent by rule of thumb, but it must not be made by running a tape round the outside of the pens.

Appeals dismissed.

Solicitors for plaintiffs: *Downing, Holman & Co.*
Solicitors for defendants: *Sandilands & Co.*

E. L.

COUNTY COUNCIL OF MIDDLESEX *v.* ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION.

1896
June 4, 5.

Poor-rate—Exemptions — Officers of County Council—Joint Occupation by Quarter Sessions and County Council—Rateability.

Premises used by a county council for the purposes of the administrative business of the county are not exempt from rating.

Premises were jointly occupied by the quarter sessions of a county and the county council:—

Held, that the occupation must be apportioned, and that to the extent to which the premises were occupied by the county council they were rateable.

CASE stated under s. 40 of the Valuation (Metropolis) Act, 1869.

In a supplemental valuation list of the united parishes of St. Margaret and St. John the Evangelist, Westminster, in the St. George's Union, made and deposited under the Valuation (Metropolis) Act, 1869, on or about May 31, 1894, the name of the Middlesex County Council was inserted as that of the occupiers of "that part of the Guildhall Westminster being the county hall committee rooms offices office of the county surveyor vaults and rooms used by the caretaker and such parts of the building as are used by the Middlesex County Council for administrative purposes as distinguished from Crown purposes"; and they were assessed in respect of such occupation at 225*l.* gross value, and 188*l.* rateable value. Certain parts of the Guildhall, such as the courts, witnesses' waiting-rooms, prisoners' cells, prison warders' rooms, counsels' and counsels' clerks' rooms, and jurymen's rooms, are used exclusively by the quarter sessions, subject to this, that the courts are used occasionally by the county council for the purpose of hearing applications for music and dancing licences. Other rooms in the building are used exclusively by the county council. Others are used jointly by the county council and the quarter sessions, such as the offices used by the clerk of the peace who is also ex-officio clerk of the county council, and by his

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deputy and staff. While one room is used jointly by the Lord Lieutenant and Custos Rotulorum of the county and by the county council for the purpose of storing the records of courts of quarter sessions and other public records of the county of Middlesex, and also documents of the county council.

The questions for the opinion of the Court were as follows :—

(*a*) Is the said Guildhall or any and what part thereof rateable and within the description of rateable property the subject of the Valuation (Metropolis) Act, 1869 ?

(*b*) Upon what principle is the said Guildhall or any rateable part thereof to be valued and assessed for the purpose of the poor or other rates ?

(*c*) Is the question whether the parts of the building used by the county council exclusively are capable of being let separately from the rest of the building material ?

Danckwerts, for the county council. No part of this building is rateable. Premises are exempt from rates or other taxation if occupied for "public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu" : per Blackburn J. in *Mersey Docks* v. *Cameron*. (1) And the same doctrine is laid down by Lord Blackburn in *Coomber* v. *Justices of Berks* (2), and by Lord Coleridge in *Martin* v. *Assessment Committee of West Derby* (3), that it is enough to bring premises within the exemption that they are occupied for the purposes of the government of the country. The Guildhall here is so occupied for the purposes of government. The government of each county is none the less administered by the Sovereign according to the theory of the constitution because it is administered through local agencies. The duties which were transferred to the county council by the Local Government Act, 1888, were the duties formerly discharged by the justices. And the justices, whether acting in their judicial or in their administrative capacity, acted as the servants

(1) 11 H. L. C. 443, at p. 465. (2) 9 App. Cas. 61, at p. 70.
(3) 11 Q. B. D. 145, at p. 150.

and delegates of the Crown. In *Nicholson* v. *Assessment Committee of Holborn Union* (1) it was held that the sessions house at Clerkenwell, which was used for administrative as well as judicial purposes, was exempt from rating on the ground that the duties performed there by the justices were "in aid of the general government of the country." But even if the purposes, for which the portions of this building used by the county council are so occupied by them, would not suffice to exempt them from rateability if the council were the sole occupiers, it must be otherwise when they are jointly occupied by the council and another body whose occupation is clearly exempt from liability to poor-rate. (2)

Bosanquet, Q.C., and *Ryde*, for the assessment committee. Property to be exempt from rating must be occupied either by or on behalf of the Crown: *Greig* v. *University of Edinburgh*. (3) It is not enough that it should be used for purposes of government; it must be used for the purposes of that part of the government of the country which is theoretically administered by the Crown: *Coomber* v. *Justices of Berks*. (4) And the powers and duties of the county council cannot be brought within that category. In *County Council of Durham* v. *Assessment Committee of Chester-le-Street* (5) it was held that a county council were rateable in respect of the occupation of an industrial school vested in them under the Local Government Act. In *Adam* v. *Commissioners of Inland Revenue* (6), where a municipal building was partly used for the administration of public justice and partly for the ordinary purposes of municipal administration, it was held by the First Division of the Court of Session that so much of the building as was occupied for the latter purpose was liable to income tax. That case is directly in point.

(1) 18 Q. B. D. 161.

(2) A further point was argued as to whether, assuming that the premises were rateable at all, the amount at which they could be assessed was not limited by a certain local Act. But as the Court were of opinion that the Act in question had no application to the site upon which the Guildhall stood, the arguments on that point have been omitted.

(3) L. R. 1 H. L., Sc. 348.

(4) 9 App. Cas. 61.

(5) [1891] 1 Q. B. 330.

(6) 27 Scottish Law Reporter, 64.

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COUNTY COUNCIL OF MIDDLESEX v. ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION.

CAVE J. It appears to me that there is very little to be said in this case either on one side or on the other. The decisions of recent years, beginning with the Mersey Docks cases (1), have taken a very different view of the rateability of property used for public purposes from that which was formerly taken, and a distinction has been drawn between Crown or Imperial purposes, such as the administration of justice, and purposes of local government. That distinction has now been too firmly established for us to do anything more than follow it, and I do not think it necessary to advert to the reasons upon which it is founded. It has, however, been suggested, that although in previous cases municipal corporations have been held rateable for buildings occupied by them for municipal purposes, the same principle does not apply to county councils created under the Local Government Act. I am unable to see the force of that contention. Whether a municipal authority be created by charter or by statute, its purposes must equally be local. The best answer that we can give at the present stage to the main question submitted to us is, that the Guildhall, in so far as it is used for administrative purposes, is rateable, and that in so far as it is used for Crown purposes it is not. It is said that there is some difficulty in carrying out such a principle owing to the fact that the clerk of the peace is also the clerk of the council, and uses certain offices in this building in both characters. But personally I can see no difficulty in apportioning the rateability between these two respective occupations. In proportion as those rooms are used by him as clerk of the council the occupation of them is rateable; in proportion as they are used by him in his other character they are not. In case, however, any difficulty not at present foreseen should arise, we propose to retain the case and give the parties leave to apply for the opinion of the Court without going to the expense of stating another case.

WILLS J. I am of the same opinion. It seems to me that the principles to be applied to such a case as this are completely beyond controversy at the present day. It is clear that in so

(1) 11 H. L. C. 443.

far as these premises are occupied for what have been called Imperial purposes—which include all purposes connected with the administration of justice, and with the business of the police—they are not rateable. They stand on the same footing as premises occupied by the servants of the Crown. Again, it has been decided that in so far as premises are used for storing the county records they are not rateable. The only difficulty in this case arises with respect to certain offices which are used by the clerk of the peace for the common purposes of the performance of his duties as clerk of the peace in connection with the administration of justice and of the administrative business of the county council. With regard to those offices it seems to me the sensible thing to do is to make a division. In so far as they are occupied for the purpose of any business connected with the administration of justice, such as the issue of summonses, or of precepts for the summoning of juries, or the collection of fines, &c., the occupation is not rateable. But in so far as they are occupied for purely municipal purposes, it is rateable. I do not anticipate that a man of experience in such matters would have any difficulty in making the necessary division. Should any difficulties, however, arise, they will be met by the course proposed by Cave J., namely, that we should retain the case, and give the parties leave to apply if necessary.

Judgment for the respondents.

Solicitor for appellants: *R. Nicholson.*
Solicitor for respondents: *W. J. Fraser.*

J. F. C.

C. A.
1896
June 22.

[IN THE COURT OF APPEAL.]

WHITTAKER *v.* SCARBOROUGH POST NEWSPAPER COMPANY.

Practice—Interrogatories—Libel—Circulation of Newspaper.

The plaintiff in an action for libel against the proprietors of a local newspaper having administered an interrogatory to the defendants asking how many copies were printed and circulated of the issue of the newspaper which contained the alleged libel, the defendants answered that a considerable number of copies of that issue were printed and published:—

Held, that the answer was sufficient.

Parnell v. *Walter* (24 Q. B. D. 441) overruled on this point.

APPEAL from an order of Collins J. at chambers affirming an order of a master.

The action was for an alleged libel published in the *Scarborough Post*, a newspaper of which the defendants were the proprietors. The defendants had set up in their defence that the words complained of were fair comment on a matter of public interest. The place of trial was Leeds. The plaintiff had administered interrogatories to the defendants, to be answered by their secretary or other proper officer, of which one was as follows: "What was the number of copies printed and circulated of the issue of the *Scarborough Post* dated November 21, 1895, and containing the words complained of in paragraph 3 of the statement of claim?" The defendants' secretary had answered that interrogatory as follows: "I admit that a considerable number of copies of the issue of November 21, 1895, were printed and published." The plaintiff applied for an order that the defendants should give a further and better answer to the interrogatory. The master granted the application, and on appeal to the judge he affirmed the order of the master, thinking himself bound by the decision in *Parnell* v. *Walter*. (1)

Montague Lush, for the defendants. The defendants ought not to be ordered to give any further answer to this interroga-

(1) 24 Q. B. D. 441.

tory. The decision in *Parnell* v. *Walter* (1) was wrong, and has been questioned in the subsequent case of *Rumney* v. *Walter*. (2) The defendants have admitted that the circulation of their newspaper is considerable, which is a sufficient answer for the purpose of the assessment of damages, the only purpose in respect of which this interrogatory is material.

Scott Fox, for the plaintiff. The matter as to which the interrogatory inquires is material for the purpose of the assessment of damages, and the defendants' answer is insufficient. The importance of the libel must depend upon the circulation of the newspaper in which it is published, and the plaintiff is entitled to be informed in round numbers as to the extent of that circulation. The principle laid down in *Parnell* v. *Walter* (1) is correct, though possibly it may have been wrongly applied in that case. In the case of such a newspaper as *The Times*, it may be that it would be futile to inquire into the extent of its circulation. But that is not so with regard to a local newspaper such as the *Scarborough Post*. A county jury at Leeds may not know anything about the *Scarborough Post* or the extent of its circulation. [He cited *James* v. *Carr*. (3)]

Montague Lush, in reply.

LORD ESHER M.R. In this case the action is for libel against a newspaper company in respect of matter published in their newspaper. The amount of the damages in such an action would not, in my opinion, generally speaking, depend on the number of copies of the newspaper that were published. If a libel were a serious one, a jury would give heavy damages, though it were only published once. On the other hand, if a libel were a trivial or ridiculous one, in respect of which the jury thought that an action ought not to have been brought, they would only give contemptuous damages, though many copies of the libel had been circulated. Since the decision in *Parnell* v. *Walter* (1) it appears to have become the practice in actions for libel against the proprietors of newspapers to administer interrogatories of this kind, asking the number of

(1) 24 Q. B. D. 441. (2) 61 L. J. (Q.B.) 149.
(3) 7 Times L. R. 4.

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Lord Esher M.R.

copies of the newspaper put in circulation. In the majority of cases such information when obtained appears to me of no value. It is argued that in the case of newspapers published in remote localities it is of value; and it is suggested that in this case, the newspaper being published in Scarborough, a Leeds jury would know nothing about its circulation. I do not think that is shewn to be so. Scarborough is a large and well known watering-place frequented by Yorkshire people. If in such a case it could be shewn that the place where the newspaper circulated was obscure and nothing would be known as to the extent of its circulation, it might be that such an interrogatory would be proper. One can hardly say that such an interrogatory ought in no case to be allowed. But in the present instance the plaintiff appears to me to fail to make out such a case. He has not ventured to swear that the *Scarborough Post* is not a well known and important paper in Yorkshire. In my opinion the case of *Parnell* v. *Walter* (1), which, if rightly decided, is an authority that, in the case of an action for libel against the proprietors of *The Times* or any of the great London or country newspapers, such an interrogatory is a proper one, was wrongly decided. I agree with the view expressed by Mathew J., and substantially also by Lord Coleridge C.J., in the subsequent case of *Rumney* v. *Walter* (2), that the interrogatories administered in *Parnell* v. *Walter* (1) were frivolous and vexatious, and that no further answer to them should have been required. In this case I think the answer given by the defendants was sufficient, and a further answer should not be ordered. For these reasons I think the appeal should be allowed.

KAY L.J. In this case I do not think that the defendants should be ordered to make any further answer to the interrogatory administered by the plaintiff. The object of administering interrogatories is to enable the party administering them to dispense with proof of material facts which may be admitted in the answers to them, or to obtain material information which only the party to whom the interrogatories are administered can give. The question is whether any further answer which

(1) 24 Q. B. D. 441. (2) 61 L. J. (Q.B.) 149.

the defendants might give to this interrogatory would be material. The newspaper in question is published at Scarborough, which is a well known watering-place in Yorkshire, and the defendants have admitted in answer to the interrogatory that the number of copies of the newspaper which were printed and published is considerable. The only purpose for which it is suggested that the information asked for by this interrogatory would be material is the assessment of damages. I agree that to some extent the information asked for would be material for that purpose, and that it is information which only the defendants can give. But it must be remembered that before interrogatories were allowed in common law actions a plaintiff could not have obtained any information except of a very general nature as to a matter of this kind, and such information is given by the answer which the defendants have already made. In a case such as *Parnell* v. *Walter* (1), where a question is asked for the purposes of a trial in London or Middlesex as to the circulation of a newspaper like *The Times*, I should say that it would be extravagant to require the proprietors of the newspaper to answer such a question at all. It is impossible not to see that in such a case the jury would know what the circulation of the newspaper is sufficiently well for the purpose of assessing the damages. If I had to express my opinion in a case like that, I should say that no answer whatever to such a question could, seriously speaking, be material. I do not, however, think that the case would be the same with regard to all local newspapers. I can imagine that there might be cases in which it would be probable that the jury would have either no information or the slightest possible information as to the circulation of the newspaper. In the present case the action is to be tried at Leeds, and I find it difficult to suppose that a Yorkshire jury would not have sufficient knowledge of the character of the defendants' newspaper for the purpose of assessing the damages in this case, apart from any information given in answer to the plaintiff's interrogatory; but, even if that were not so, the defendants having admitted by their answer that the circulation of the newspaper containing the

(1) 24 Q. B. D. 441.

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alleged libel was considerable, I cannot see any necessity for ordering any further answer to be given by the defendants. I therefore agree that the appeal should be allowed.

A. L. SMITH L.J. I am of the same opinion. In this case the judge at chambers thought that he was bound by the decision in *Parnell* v. *Walter* (1) to order the defendants to give a further and better answer to this interrogatory; but he was evidently dissatisfied with the order which he felt compelled to make. So far as I know, prior to the decision of that case in 1890, there was no authority for the allowance of such interrogatories as were there administered. With all deference to the learned judges who decided that case, such interrogatories in the case of a newspaper with an enormous circulation like *The Times* appear to me to be ridiculous. If they were answered, the answers would be quite useless. Nobody would ever dream of giving evidence in such an action as to the number of copies of *The Times* that were circulated. In my opinion, the decision in *Parnell* v. *Walter* (1) was wrong. I should say myself that primâ facie, in an action of libel against the proprietors of a newspaper such as one of the great London newspapers or leading country newspapers, an interrogatory of this kind ought not to be allowed. So far as the current of authority subsequent to the case of *Parnell* v. *Walter* (1) is concerned, I wish to point out that in *James* v. *Carr* (2) in 1890, and *Rumney* v. *Walter* (3) in 1891, it appears that the judges who decided those cases would not have decided as they did unless they had thought themselves bound by the decision in *Parnell* v. *Walter*. (1) The truth is that the amount of the damages in an action of libel does not depend upon the number of the copies published but on the gravity of the imputation made. I agree that there may be cases in which the alleged libel is published in a newspaper the circulation of which no one knows anything about, and therefore I will not say that such an interrogatory ought never to be allowed in order to shew that such a newspaper has some circulation. But I

(1) 24 Q. B. D. 441. (2) 7 Times L. R. 4.
(3) 61 L. J. (Q.B.) 149.

think that the cases in which it ought to be allowed are rare. In the present case the answer already given to the interrogatory administered by the plaintiff is quite sufficient, and therefore I think the order for a further answer ought to be set aside.

Appeal allowed.

Solicitors for plaintiff: *Radford & Frankland, for Birdsall & Fox, Scarborough.*

Solicitors for defendants: *Iliffe, Henley & Sweet, for Watts, Kitching & Donner, Scarborough.*

E. L.

[IN THE COURT OF APPEAL.]

CHADDOCK *v.* BRITISH SOUTH AFRICA COMPANY.

Practice—Discovery—Interrogatories—Action against Company—Application to Interrogate Member—Notice of Application—Order XXXI., *r.* 5.

Where, a joint stock company being a party to an action, an application is made by the opposite party for an order allowing the delivery of interrogatories to a member of the company under Order XXXI., r. 5, notice of the application ought, as a rule, to be served upon him.

APPEAL from an order of a judge at chambers.

The facts were as follows. The plaintiff, having brought an action against the defendant company, applied under Order XXXI., r. 5, for an order that he should be at liberty to deliver interrogatories to the company to be answered by Rutherfoord Harris, their secretary, or, in the alternative that he should be at liberty to deliver interrogatories to Rutherfoord Harris, a member of the company. It appeared that Rutherfoord Harris, who was a member of the company, had been their secretary; but there was a dispute as to whether he continued to be so, the plaintiff alleging that he was still secretary, and the defendants alleging that he had resigned. He was not a party to the action. No notice of the application had been served upon him.

A master made an order at chambers for the delivery of

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interrogatories by the plaintiff to be answered by the proper officer of the company.

On appeal by the plaintiff the judge affirmed the order of the master, holding, as regards the application to interrogate Rutherfoord Harris as a member of the company, that notice ought to have been given to him of the application. (1)

W. Arnold Statham, for the plaintiff. It is contended that upon the facts the proper inference is that Rutherfoord Harris still remains the secretary of the company, and the order should have been made upon him by name as such. The plaintiff desires that the interrogatories should be answered by him as having personal knowledge of the matters in question. Assuming that he has ceased to be secretary, a newly appointed secretary might not have any personal knowledge on the subject. If there is not any officer who is able to answer the interrogatories, an order may be made under Order XXXI., r. 5, that a member of the company should answer them as representing the company: *Berkeley* v. *Standard Discount Co.* (2) It was held in *Wilson* v. *Church* (3) that the officer or member whom it is sought to interrogate can no longer be made a party to the action, as was the old practice in the Court of Chancery. There is no necessity that notice of the application should be given to the member through whom it is sought to interrogate the company, he not being a party, any more than there is to give such notice to the secretary.

Lord Robert Cecil, for the defendants. The master and judge at chambers had a discretion under Order XXXI., r. 5, as to what order they would make. They exercised that discretion in this case, and the Court will not interfere with the order, unless it is manifestly wrong. The order was made in the usual form, and there is no reason shewn for any exceptional order in this

(1) By Order XXXI., r. 5, "If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly."

(2) 9 Ch. D. 643; 13 Ch. D. 97.

(3) 9 Ch. D. 552.

case. If Rutherfoord Harris is still secretary, and is the proper officer to answer the interrogatories, he will have to do so, and the plaintiff will get what he desires. If he is not, the company will have to procure the information requisite for answering the interrogatories from the proper person. It is contended that, if it is sought to interrogate a member of the company under the rule, it is clear that he ought to have notice of the application. [He cited *Manchester Val de Travers Paving Co.* v. *Slagg*. (1)]

W. Arnold Statham, in reply. No notice of the application appears to have been given to the member of the company to be interrogated in *Berkeley* v. *Standard Discount Co.* (2) He could apply to rescind the order, as was done in that case, if for any reason he was not the proper person, or was entitled for any reason to object to answer the interrogatories.

LORD ESHER M.R. I am of opinion that we ought not to interfere with the order made by the judge at chambers. In this case the plaintiff, having brought an action against a company, seeks to interrogate the defendants through an officer or member of the company under Order XXXI., r. 5. When an application is made to interrogate a company under that rule, I think it is clear that it is a matter for the discretion of the judge whether an order, and, if so, what order, shall be made. In cases where the application is to interrogate the company through their secretary or other such officer, it being his duty to be acquainted with the affairs of the company and to act for them in such matters, I should say that it would not be necessary to serve the officer with notice of the application. But, where the application is to interrogate the company through a member of it who is not an officer, it is impossible to say that every member of the company must be taken to know or is bound to be acquainted with all the affairs and circumstances of the company. The member in question may or may not have the requisite knowledge to answer the interrogatories. If an order is made that the company shall answer through him, such an order would impose serious liabilities upon him, and

(1) W. N. (1882) 127. (2) 9 Ch. D. 643.

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therefore it is a fair rule that he should have notice of the application. He may be in a position to say truly that he does not and cannot be expected to know anything about the matters as to which it is sought to interrogate him. The secretary or other such officer of the company is bound to be in a position to act for the company, but a member is not so bound. It seems to me to be a good rule to insist upon notice of such an application being given to the member through whom it is proposed to interrogate the company; and, at any rate, I think in the exercise of his discretion a judge at chambers has a right to insist upon it. Here no notice was given to Rutherfoord Harris of the application that interrogatories should be administered to him as a member of the company. That application appears to me to have been but faintly made as an alternative. The plaintiff was insisting that Rutherfoord Harris was still the secretary of the company, and asking to interrogate the company through him as the secretary. If he is still the secretary, and is the proper officer to answer these interrogatories, the plaintiff has in effect an order that he shall answer them. The plaintiff says that the order is wrong, and that it should have been made against Rutherfoord Harris by name as being the secretary. I think the judge was quite right in saying in the exercise of his discretion that, there being a question whether he was the secretary, he would not make an order against him by name as secretary, because upon an order made in that form he would have to answer whether he was secretary or not. It seems to me that in cases under Order XXXI., r. 5, the practice ought to be that no notice of the application need be given to the secretary or other such officer of the company, but where the application is that the company shall answer by one of its members, as a rule, notice of the application should be served upon the member in order that he may have an opportunity of making objection to it. In this case the judge, in the exercise of his discretion, has acted on that view of the proper practice, and I think he was right in so doing.

KAY L.J. In this case the application is that the plaintiff shall be at liberty to deliver interrogatories to the defendant

company to be answered by Rutherfoord Harris, their secretary, or in the alternative that the plaintiff shall be at liberty to deliver interrogatories to Rutherfoord Harris, a member of the defendant company. With regard to the application to interrogate the company through their secretary, I do not think it would be necessary to serve any notice on him; but with regard to the alternative application for liberty to deliver interrogatories to Rutherfoord Harris, as a member of the company, it seems to me impossible to hold that it was not necessary to serve him with notice of the application that he should answer in his individual capacity as a member. He was not served with any notice of that application, and is not represented before us. With regard to the first branch of the application, a question has been raised as to whether he is the secretary of the company. He was no doubt at one time their secretary, but it is alleged that he has ceased to be so, having resigned. The plaintiff suggested that that was not so, and that, though he had sent in his resignation, it had not been accepted. The judge at chambers cannot try a question of that kind. I think the order that was made at chambers was perfectly right. That order was not that the secretary should answer the interrogatories, for the secretary at the present time might be somebody who knew nothing about the matters as to which it was desired to interrogate. The order is that the interrogatories shall be answered by the proper officer. If Rutherfoord Harris be the proper officer, as the plaintiff alleges, he will have to answer them. The plaintiff says that he is particularly anxious that Rutherfoord Harris should answer them. But, as I have already said, I think that, if the application is that he shall answer them as a member of the company, notice of that application ought to have been served upon him. For aught we know, he may know nothing about the matters as to which it is sought to interrogate, and he ought to have an opportunity of being heard in answer to the application. I think the order made at chambers was right and should be affirmed.

A. L. SMITH L.J. I agree. In this case the plaintiff brings an action against a company. He then takes out a summons

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for leave to interrogate the company through Rutherfoord Harris, their secretary. The case comes before the master, and afterwards before the judge on appeal from his decision; and a controversy arises whether Rutherfoord Harris is still the secretary of the company or not, the plaintiff asserting that he is, and the defendant company asserting that he has resigned. The judge cannot try that issue, and he therefore makes an order in the ordinary form for the delivery of interrogatories to be answered by the proper officer of the company. If the plaintiff is right and Rutherfoord Harris is such officer, then he will have to answer the interrogatories. It may, however, be that he is not the proper officer. The plaintiff therefore asks us to make an order upon him personally as a member of the company under Order XXXI., r. 5. But I think, before such an order is made upon a person who on this hypothesis is not an officer of the company, notice of the application ought to be served upon him. I observe that in the case of *Manchester Val de Travers Paving Co.* v. *Slagg* (1) a doubt appears to have been expressed by Jessel M.R. and Cotton L.J. whether an answer to interrogatories by a member of a company would be evidence as against the company. I think the meaning of Order XXXI., r. 5, must be that, if the judge thinks that a member of the company is in such a position with regard to the company that he is a proper person to answer the interrogatories on their behalf, he may order him to do so, and that his answers will in that case bind the company; and if so, that seems to shew still more clearly the propriety of his being cited, and having an opportunity of being heard upon the application against the company. I think the order made by the judge at chambers was right.

Appeal dismissed.

Solicitors for plaintiff: *Jaques & Co.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

(1) W. N. (1882) 127.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1896
May 19.

PEEBLES *v.* THE OSWALDTWISTLE URBAN DISTRICT COUNCIL.

Practice—Change of Parties—Death of Plaintiff—Survival of Cause of Action—Action for Mandatory Injunction—Statutory Duty on part of Defendants—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

An action was commenced by a manufacturer for a mandamus to compel the defendants, under the Public Health Act, 1875, s. 15, and the Rivers Pollution Prevention Act, 1876, s. 7, to make a sewer to enable the plaintiff to dispose of the liquids proceeding from his factory. The plaintiff died, and his executors applied to be substituted as plaintiffs:—

Held, that as the alleged cause of action arose out of a statutory duty to the deceased it survived to his executors.

Appeal from an order of a judge at chambers.

An action was commenced by P. C. Peebles, since deceased, who was owner and occupier of a factory called the Whiteash Paper Mill, within the urban district of Oswaldtwistle, of which the defendants are the local authority. The claim of the plaintiff was stated to arise under the Public Health Act, 1875, ss. 15 and 21, and the Rivers Pollution Prevention Act, 1876, s. 7, and was for "a mandamus commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiff to carry the liquid proceeding from his factories or manufacturing processes into the sewers under their control."

After the commencement of the action the plaintiff died, having by his will appointed four executors, who duly proved the will, and applied for an order that they should be at liberty to carry on and continue the action. Kennedy J. granted the application.

The defendants appealed.

By the Public Health Act, 1875, s. 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually

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draining their district for the purposes of this Act"; and s. 21 gives power to owners and occupiers within the district to drain into sewers of the local authority.

By the Rivers Pollution Prevention Act, 1876, s. 7, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers."

C. C. Scott, for the defendants. The duty on the part of the defendants is stated to arise under the Public Health Act, 1875, s. 15, and the Rivers Pollution Prevention Act, 1876; but no such duty exists. If it did, the proper course would be to make an application to the Local Government Board under s. 299 of the Public Health Act, 1875. Under these circumstances the Court should not allow the action to be continued. Further, the right of action, if it existed, did not survive to the executors. No damages are or could be claimed, and there is no trespass or injury to the estate of the testator. At the most there is a mere omission to do some act for which the occupier for the time being might maintain an action, but not the executors of a deceased occupier. An action founded on such a right does not survive to an executor or administrator: *Wheatley* v. *Lane*. (1)

The right to a mandatory injunction for obstruction to the access of light to a freehold house passes to the devisee: *Jones* v. *Simes* (2); and the executors are not suing as devisees. [He also cited *Flinn* v. *Perkins* (3) and *Phillips* v. *Homfray*. (4)]

C. A. Russell, for the plaintiff. The defendants owed a duty to the deceased which he could have enforced in this action: Order LIII. The plaintiffs, as executors, are in a position to enforce this duty, for the value of the testator's estate is affected by the non-performance of the duty. If the defendants had contracted with the deceased to make the necessary sewers, the action could clearly be maintained by his executors, and the

(1) 1 Wms. Saund. 216 a.
(2) 43 Ch. D. 607.
(3) 32 L. J. (Q.B.) 10.
(4) 24 Ch. D. 439.

executors are entitled to continue this action, although the duty was imposed by statute and was not matter of contract.

C. C. Scott, in reply.

LORD ESHER M.R. I am not prepared to say that the learned judge was wrong in making the order which he made on the summons before him. A great many points have been raised; but there is only one with which we are concerned. The deceased man brought an action founded on a statutory duty which he alleged to exist on the part of the defendants. It is not necessary at this stage to inquire whether such a duty did in fact exist. The duty was alleged, and, if it existed towards him, no one can enforce it unless this order stands. Under these circumstances it is not wrong to say that if a duty was owed by the defendants to the deceased with regard to his property the non-performance of that duty gave rise to a cause of action that survived to his executors. I think, therefore, the appeals fails and should be dismissed.

A. L. SMITH L.J. The deceased brought an action founded on two statutes, the Public Health Act, 1875, and the Rivers Pollution Prevention Act, 1876, on the ground that they imposed a duty on the part of the defendants towards him. We have on this appeal nothing to do with the question whether the duty is really imposed by those statutes or not. His action was for a mandamus to perform this alleged duty, and while the action was pending he died. The sole question is whether his executors should be substituted as plaintiffs under Order XVII. In the note to *Wheatley* v. *Lane* (1) it is said: "It was a principle of the common law, that if an injury were done either to the person or the property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done"; but it is pointed out in the same note that this rule "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived." If there had been a contract

(1) 1 Wms. Saund. 216 a.

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on the part of the defendants to supply a sewer for the purposes of the plaintiff's works, there is no question that the cause of action arising from a breach of such contract, namely, to supply a sewer, would have survived. It is said that the cause of action in this case did not survive because the duty alleged is one arising under statute and not by reason of contract. The words of the note that I have read are very general, and quite wide enough to cover the present case. I think the learned judge was right, and that this case is not governed by the decision in *Jones* v. *Simes* (1), to which reference has been made.

Appeal dismissed.

Solicitors for plaintiff: *Boote & Edgar, Manchester.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Charles Costeker, Darwen.*

A. M.

C. A. 1896 *March* 23.

[IN THE COURT OF APPEAL.]

KEMP AND ANOTHER *v.* LESTER.

Practice—Mortgage—Attornment—Power to Enter and Determine the Tenancy—Tenancy at Will—Action by Mortgagee for Possession—Order III., *r.* 6 (*F*); *Order* XIV.

A mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee at a yearly rental payable half-yearly, and a further clause by which the mortgagee might at any time, without giving any previous notice of his intention so to do, enter upon and take possession of the premises, and determine the tenancy created by the attornment. The rent was in arrear, and the mortgagee brought an action to recover possession, and applied for an order for recovery of the premises under Order XIV.:—

Held, that the claim to recover possession was founded on the determination of a tenancy at will, and not on forfeiture, and that the writ could be specially indorsed under Order III., r. 6 (F), and judgment signed under Order XIV.

APPEAL from an order of a judge at chambers permitting the plaintiff to sign judgment under Order XIV.

The action was brought to recover possession of certain

(1) 43 Ch. D. 607.

premises and for mesne profits. The premises were mortgaged by the defendant to the plaintiffs to secure repayment of a sum of money and interest thereon. The mortgage deed contained the following clause: "the mortgagor hereby attorns tenant from year to year to the mortgagees in respect of the said premises at the yearly rent of 100*l.* payable half-yearly . . . . and agrees that the mortgagees shall have and exercise the usual remedies of landlords for recovery of such rent but all monies received by the mortgagees for rent under this attornment shall be accepted in or towards satisfaction of any interest due under this security"; and a further clause: "Provided also that the mortgagees may at any time without giving any previous notice of their intention so to do enter upon and take possession of the said premises whereof the mortgagor hath attorned tenant as aforesaid and determine the tenancy created by the aforesaid attornment." The rent was in arrear, and the plaintiffs brought this action, and applied at chambers for leave to sign judgment under Order XIV. for the recovery of the premises and for mesne profits.

Cave J. made the order.

The defendant appealed.

Montague Lush, for the defendant. The plaintiff is not entitled to specially indorse the writ under Order III., r. 6, because this is not a case "against a tenant whose term has expired or has been duly determined by notice to quit." In *Arden* v. *Boyce* (1) Lopes L.J. points out that the rule applies to "practically undefended cases, where a tenant holds over after the expiration of his lease, or after the expiration of a notice to quit in the case of a tenancy from year to year." The defendant in this case is a tenant from year to year, and has received no notice to quit. In the same case the Court looked to the substance of the claim, and came to the conclusion that it was based on a forfeiture, so that the writ could not be specially indorsed. That is the case here; for it is obvious that the plaintiff is proceeding because the mortgage interest is in arrear. If *Hall* v. *Comfort* (2) is relied on in support of

(1) [1894] 1 Q. B. 796. (2) 18 Q. B. D. 11.

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the plaintiffs' right to summary process, that case is inconsistent with and has been overruled by *Arden* v. *Boyce*. (1)

Toller, for the plaintiffs, was not called on.

LORD ESHER M.R. The decision in *Arden* v. *Boyce* (1) does not apply in the present case. That decision was in accordance with the established rule that if a tenancy is determined by forfeiture Order III., r. 6, does not apply, and judgment cannot be obtained under Order XIV. In the present case there is a clause in the deed which creates a tenancy from year to year; but there is a subsequent clause which gives the landlord liberty to enter and take possession at any time without giving any notice. That right does not depend on forfeiture, and therefore there is nothing to prevent an application to sign judgment under Order XIV.

LOPES L.J. The argument that the right of the landlord in this case is founded on a forfeiture is untenable. The mortgagee seeks to eject the mortgagor on the ground that the relation of landlord and tenant has determined. Whether he can do this depends on the terms of the mortgage deed. It is true that a clause in the mortgage deed would make the mortgagor tenant from year to year; but that is qualified by the clause which makes him tenant at the will of the mortgagee. The mortgagee determined this tenancy, as he had a right to do. The decision in *Arden* v. *Boyce* (1) is not applicable to such a state of things. There the Court held that the claim to recover the premises, if any rent was in arrear for a certain time, was in substance based on a forfeiture, so that the plaintiff had no right to proceed under Order XIV. That is not the present case; and the learned judge was right in allowing the plaintiffs to sign judgment under that order.

RIGBY L.J. I am of the same opinion. The law does not in general take notice of the length of a term: a term gives the right of possession so long as it continues, and the longest number of years and the will of the landlord are both terms in

(1) [1894] 1 Q. B. 796.

the eye of the law. The decision in *Arden* v. *Boyce* (1) was given in accordance with the principle that this Court will not disturb a long continued course of practice at chambers under the Judicature Rules and previous statutes. The established practice which applied in that case is that in the case of the determination of a tenancy by forfeiture Order XIV. is not applicable. Was there any forfeiture in the present case? Forfeiture must be founded on some default. In the case before us the landlord had power to put an end to the tenancy at any time without previous notice, and to enable the landlord to exercise that power there need be no default on the part of the tenant. It would be strange if, on the determination of a tenancy for 1000 years, judgment could be signed under Order XIV., while a tenant at will was in a different position when his right to possession was properly determined. There is no reason for such a difference, and the order made in this case was right.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Stone & Co., Leicester.*

Solicitor for defendant: *L. Kirkman, for J. C. Bulman, Leicester.*

(1) [1894] 1 Q. B. 796.

A. M.

1896
June 15.

SMITH *v.* GILL.

County Court—Appeal—Claim not exceeding 20*l.*—*Counter-claim exceeding* 20*l.*—*Right of Appeal without Leave—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

The absolute right of appeal given by s. 120 of the County Courts Act, 1888, in actions of contract and tort, where the debt or damage claimed exceeds 20*l.*, extends to cases where the defendant's counter-claim exceeds 20*l.*, although the claim of the plaintiff is below that amount.

APPEAL from the judge of the Leeds County Court.

The plaintiff claimed 3*l.* 11*s.* 3*d.* for work done; the defendant counter-claimed 21*l.* 17*s.* 6*d.* for goods sold and delivered. The learned judge found for the plaintiff upon both claim and counter-claim. The defendant appealed. No leave to appeal was given by the judge.

Buckmaster, for the plaintiff. There is a preliminary objection to the hearing of this appeal. The plaintiff's claim being for less than 20*l.*, there is no right of appeal without leave; it is immaterial that the counter-claim is above that amount. Leave to appeal is required under s. 120 of the County Courts Act, 1888, in actions of contract or tort "where the debt or damage claimed does not exceed 20*l.*"; the word "claimed" there used means claimed by the plaintiff. A counter-claim is set up by giving a notice under s. 82 of the Act; it is only a step in the action, and is not an independent proceeding instituted by the defendant himself.

J. E. Bankes, for the defendant, was not called upon.

PER CURIAM (Cave and Wills JJ.). We think that there is nothing in the objection.

The appeal was then heard on the merits and dismissed.

Objection overruled.

Solicitors for plaintiff: *Prior, Church & Adams, for W. H. Forster, Leeds.*

Solicitors for defendant: *Hamlin, Grammer & Hamlin, for J. Vosper Curry, Bradford.*

W. J. B.

[CROWN CASE RESERVED.]

1896
April 25;
June 16.

THE QUEEN *v.* LILLYMAN.

Criminal Law—Evidence—Rape—Particulars of Complaint made by Prosecutrix.

Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part.

CASE stated by Hawkins J.

The prisoner was tried at the Nottingham Assizes upon an indictment containing three counts: the first count charged him with an attempt to have carnal knowledge of the prosecutrix, a girl above the age of thirteen and under the age of sixteen years; the second with an assault upon her with intent to ravish and carnally know her; and the third with an indecent assault upon her.

The prosecutrix was called as a witness, and deposed to the acts complained of having been done without her consent. Counsel for the prosecution tendered evidence in chief of a complaint made by her to her mistress, in the absence of the prisoner, very shortly after the commission of the acts, and proposed to ask the details of the complaint as made by the prosecutrix. The admission of the evidence was objected to by the prisoner's counsel; but the learned judge overruled the objection and admitted the evidence. The mistress then deposed to all that the prosecutrix had said respecting the prisoner's conduct towards her. The jury found the prisoner guilty, and he was sentenced to one month's imprisonment with hard labour, subject to the opinion of the Court upon the question whether the evidence so admitted was rightly admitted. If the evidence was rightly admitted, the conviction was to be

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affirmed; if otherwise, to be quashed. The execution of the sentence was respited, and the prisoner admitted to bail pending the decision of the Court. (1)

J. E. Fox, for the prisoner. The evidence was improperly admitted. Upon principle, the fact of a complaint having been made is not admissible in evidence, but it has been the universal practice to admit it; the particulars of the complaint, however, cannot be given in evidence. What is then said by the prosecutrix is not part of the res gestæ, and its admission must seriously prejudice the prisoner who has no means of contradicting it. The authorities shew a large balance of judicial opinion against admitting the evidence. It is true that such evidence was admitted by Byles J. in *Reg.* v. *Eyre* (2), and by Bramwell L.J. in *Reg.* v. *Wood* (3); but in the former case it was admitted on the ground that the complaint was made immediately after the offence had been committed, and in the latter the name of the person complained of had already been given in evidence. Putting aside the doubtful cases of *Reg.* v. *Walker* (4) and *Reg.* v. *Little* (5), the evidence of particulars of a complaint was held inadmissible in the following cases: *Rex* v. *Clarke* (6); *Rex* v. *Wink* (7); *Reg.* v. *Megson* (8); *Reg.* v. *Osborne* (9); *Reg.* v. *Nicholas.* (10) Further, whatever may be the case in charges of rape, where the question of the consent of the prosecutrix is material, the evidence is inadmissible in charges under the Criminal Law Amendment Act, where consent is immaterial, and the evidence is useless for testing the credibility of the prosecutrix on the question of consent. [He also cited *Rex* v. *Brazier* (11); *Aveson* v. *Kinnaird* (12); *Rex* v. *Foster* (13); *Reg.* v. *Bedingfield.* (14)]

(1) In a note to the case the learned judge stated that, the authorities being conflicting, he had reserved the case for consideration in the hope that the law might be settled upon a point of daily occurrence.
(2) 2 F. & F. 579.
(3) 14 Cox, 46.
(4) 2 Mood. & Rob. 212.
(5) 15 Cox, 319.
(6) 2 Stark. 241.
(7) 6 C. & P. 397.
(8) 9 C. & P. 420.
(9) C. & M. 622.
(10) 2 C. & K. 246.
(11) Leach, 199; 1 East, P. C. 443.
(12) 6 East, 188, 193.
(13) 6 C. & P. 325.
(14) 14 Cox, 341.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*H. Sutton* and *Cracroft* with him), for the prosecution. The authorities are overwhelming in favour of the admissibility of evidence of the fact that a complaint was made, and the balance of authority is in favour of admitting the particulars of the complaint. The principle upon which the fact of the complaint having been made is allowed to be given in evidence is that it is the natural expression of the woman's feelings that as soon as possible after the occurrence she should tell her mother, or her mistress, or some person in a confidential relation, what has happened; it is further admissible as evidence of non-consent. If the fact of the complaint is admissible, there is no reason for excluding the particulars of it, which evidence, if admitted, would be no more prejudicial to the prisoner than evidence of the fact of a complaint which every one in Court would infer had been made against him. [He cited the following additional authorities: 1 Hale P. C. 633; *Thompson* v. *Trevanion* (1); *Wright* v. *Tatham* (2); *Rex* v. *Ridsdale* (3); Stephen on Evidence, ed. of 1893, 162; *Reg.* v. *Guttridge* (4); *Reg.* v. *Lunny* (5); *Reg.* v. *Pook* (6); *Reg.* v. *Edwards* (7); *Reg.* v. *Wainwright* (8); *Reg.* v. *Goddard* (9); Wharton's Criminal Evidence, s. 691.

J. E. Fox, in reply.

Cur. adv. vult.

June 16. The judgment of the Court (Lord Russell of Killowen C.J., Pollock B., Hawkins, Cave, and Wills JJ.) was delivered by

HAWKINS J. The prisoner was tried before me at the Nottingham Assizes upon an indictment containing three counts. The first charged him with an attempt to have carnal knowledge of one Florence Sevestre Green, a girl above the age of thirteen and under the age of sixteen; the second with an assault on the same girl with intent to ravish her; the third with an indecent assault, also upon the same girl. The girl

(1) Skinner, 402.
(2) 7 A. & E. 313.
(3) Starkie on Evidence, 469.
(4) 9 C. & P. 471.
(5) 6 Cox, 477.
(6) 13 Cox, 172, n.
(7) 12 Cox, 230.
(8) 13 Cox, 171.
(9) 15 Cox, 7.

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was examined as a witness in support of these charges, and deposed to the acts she complained of having been committed without her consent. For the Crown, evidence was tendered in chief of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged, and it was proposed to ask the witness called for that purpose to state the details of the complaint in the language used by the girl. Counsel for the prisoner objected, first, that the complaint could not be given in evidence at all, and, secondly, that even if the fact of a complaint having been made was admissible, the particulars of it could not be elicited in the examination in chief. I overruled both objections, and the complaint with full particulars was deposed to by the witness. The jury found the prisoner guilty on the first count only. That, however, does not affect the question we have to decide, because, although to establish guilt upon that count it was not essential to prove want of consent, yet, as the girl had emphatically stated that whatever was done was against her will, the reasons which in our opinion, as it will appear, made the complaint evidence upon the second and third counts were equally applicable to the first.

It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestæ, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.

In every one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In Hawkins' Pleas of the Crown, bk. i. c. 41, s. 9, it is said: "It is a strong, but not a conclusive, presumption against a woman that she made no

complaint in a reasonable time after the fact"; and in Blackstone's Commentaries, vol. iv., c. 15, p. 211 (1), referring to the time when Bracton wrote (in the reign of Henry III.), it is said: "But in order to prevent malicious accusations it was then the law that the woman should immediately after, dum recens fuerit maleficium, go to the next town and there make discovery to some credible persons of the injury she has suffered." Later on, at p. 213, it is said: "And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender . . . . these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned." It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.

We proceed to consider the second objection, which is, that the evidence of complaint should be limited to the fact that *a complaint* was made without giving any of the particulars of it. No authority binding upon us was cited during the argument, either in support of or against this objection. We must therefore determine the matter upon principle. That the *general usage* has been substantially to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the

(1) 4th ed. (1770); see Stephen's Comm. vol. iv. p. 79 (11th ed.): "Cum clamore et hutesio accedere debet ad villas vicinas et ibi iniuriam sibi illatam probis hominibus ostendere," &c. Bracton, fo. 147.

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name of a particular person, cannot be denied; but it is equally true that judges of great experience have dissented from this limitation, and of those who have adopted the usage none have ever carefully discussed or satisfactorily expressed the grounds upon which their views have been based.

Rex v. *Brazier* (1), decided in 1779, is the earliest authority that we propose to cite as throwing any valuable light on the subject. Before that case there existed in the minds of some of the judges an impression that although a child incapable of understanding the nature and obligations of an oath was not a competent witness, nevertheless upon a charge of rape, or assault with intent to commit that crime, she might and ought to be heard without oath to give the Court information, and that upon that unsworn information the accused person might be convicted. In *Rex* v. *Brazier* (1), which was tried before Buller J., that learned judge went still further, and admitted as evidence such information on the testimony of third persons to whom it was first given. There the prisoner was indicted for an assault with intent to commit a rape upon a girl under seven years of age. The girl herself, by reason of her then presumed incompetency to be sworn, was not produced as a witness on the trial; inasmuch, however, as she had, on the afternoon of the day on which the outrage was charged to have been committed, immediately on her coming home made a statement to her mother (though not in the presence of the prisoner) of the full particulars of the alleged assault, her mother was allowed to prove this statement; it was left to the jury as evidence of the facts complained of, and practically upon it the prisoner was convicted. The case was afterwards twice considered by the judges: upon the first occasion two of them, Gould and Willes JJ., expressed a view that the girl's statement was admissible as part of the transaction itself; this view, however, was not adopted by the rest of the judges, and on the second occasion they were all unanimously of opinion that no testimony whatever could legally be received except upon oath (2),

(1) Leach, 199; 1 East, P. C. 443.

(2) Since the Criminal Law Amendment Act, 1885, under the provisions of that Act, and subject to such corroboration as therein required, the unsworn testimony of a child of tender years may be received.

and that no evidence on oath of the commission of the crime having been given, the evidence of the girl's statement to her mother ought not to have been received. This case, therefore, in effect decided that the mere complaint is no evidence of the facts complained of, and that the admissibility of the evidence of the complaint is dependent upon proof of the facts by sworn or other legalized testimony. It is obvious, however, that, upon the assumption that the complaint was admissible in evidence, it was in the case referred to admitted with all its details.

When and for what reason the proof of the complaint was first limited to answers to such questions as these, "Did she make a complaint?" "Did she mention a name?" "Whose name?" &c., I have not been able to discover. *Rex* v. *Clarke* (1) is cited in several text-books on Criminal Evidence as an authority that in proving the complaint the particulars of it cannot be given in evidence; but the ruling of Holroyd J. certainly does not go to that extent. That learned judge ruled, indeed, that the fact of the woman having made a complaint was admissible in evidence, as also was the description of her state and appearance at the time. But he did not rule that the particulars of such complaint could not be given in evidence. He only ruled, and in our opinion he correctly ruled, that they were not evidence of the truth of her complaint or of the statements of fact on which it was based. In this sense the ruling is cited in Phillips and Amos on Evidence, vol. i. p. 204 (2), and in this sense we adopt it as settled law. That case is clearly not an authority for the limitation of the evidence of the complaint.

In *Reg.* v. *Walker* (3), decided in 1839, on the trial of a person for assaulting a female with intent to commit a rape, Parke B. permitted a relative of the woman, to whom she had made immediate complaint, to give evidence generally that such complaint was made, but refused to allow the witness on examination in chief to state the particulars of it, upon the ground that, according to the usage which had then obtained, such particulars should not be given, but that it should be left

(1) 2 Stark. 241. (2) And see Phillips and Arnold on Evidence, 10th ed. p. 151.
(3) 2 Mood. & Rob. 212.

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to the prisoner's counsel to bring the details of the complaint before the jury, if he thought fit to do so. It is clear, however, that the learned Baron did not approve of that usage, for he prefaced his ruling by saying, "the sense of the thing certainly is that the jury should in the first instance know the nature of the complaint made by the prosecutrix, *and all that she then said*. But for reasons which I never could understand the usage has obtained."

Reg. v. *Megson* (1), decided in 1840, was an indictment against the prisoners for a rape on a woman who had since died without having made any admissible deposition which could be laid before the jury; that she had been ravished by somebody was beyond all question. On the part of the prosecution it was sought to put in evidence a detailed account of the transaction in the shape of a complaint by the woman with a view by it alone to shew the prisoners to be the guilty persons. Rolfe B. rejected it, saying: "There is a wide difference between receiving such statements as confirmatory of a prosecutrix's credibility in a charge of rape on which she is examined as a witness, and a case like the present, where the complaint made is to be received as independent evidence." In summing up he added: "In ordinary cases of rape, where a witness describes the outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage is properly admissible to shew her credit and the accuracy of her recollection." This case is in our opinion improperly cited as an authority for excluding the particulars of the complaint. We look upon it only as a ruling that the particulars could not be used as independent evidence of the facts alleged, to the same effect as was, according to our interpretation, the ruling in *Rex* v. *Clarke*. (2) The last few words of the passage cited from the summing-up rather indicate that Rolfe B.'s view was that, for the purpose of confirmation merely, the details ought to be given. How, otherwise, one might well ask, could the "woman's credit and the accuracy of her recollection" be tested by it?

Reg. v. *Guttridge* (3), decided in 1840, was a very similar

(1) 9 C. & P. 420. (2) 2 Stark. 241.
(3) 9 C. & P. 471.

case. The prosecutrix was absent when the trial took place. It was sought to put in her complaint, made on the following day after the alleged outrage. Parke B. thought it safer to reject the evidence on the ground that it was not part of the res gestæ, but only confirmatory evidence, which could not be used, as the prosecutrix had given no evidence. There is nothing in that case to suggest that the learned Baron intended to rule that, if evidence of the complaint were admissible, the particulars ought to be excluded.

In *Reg.* v. *Osborne* (1), decided in 1842, on an indictment for rape, the prosecutrix on oath stated that soon after the alleged outrage, and as she was returning home, she made complaint to a Mrs. Partridge, who was called as a witness to confirm her statement. The counsel for the prosecution was allowed to ask, "Did the prosecutrix make any complaint?" To which the answer was, "Yes." He was then allowed to ask, "Did she name any particular person?" To which she also said, "Yes." It was then proposed by the counsel to ask, "Whose name was mentioned?" To this it was objected that the question was inadmissible, upon the ground that, though the fact of the complaint was admissible as shewing the prosecutrix was not then an assenting party, the name was an important particular as against the prisoner, and therefore could not be asked, and the ruling of Patteson J. in the case of *Rex* v. *Wink* (2), hereafter referred to, was cited in support of the objection. In support of the question it was urged that the whole complaint was admissible as part of the res gestæ. Cresswell J. ruled that the statement of the prosecutrix did not form part of the res gestæ, treating *Rex* v. *Wink* (2) as a direct authority against the question. In this ruling we agree; but if it had been pressed upon that learned judge that the complaint in all its detail was nevertheless a fact admissible for the purpose of shewing consistency of conduct on the part of the woman, we doubt if he would have rejected the evidence. At all events, the case cannot be taken as a ruling upon the point now under discussion, for the decision was based entirely upon the statement not being part of the res gestæ.

(1) C. & M. 622. (2) 6 C. & P. 397.

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In support of the admissibility of all the particulars of a complaint, it was pointed out that the late Sir J. F. Stephen, in his Digest of the Law of Evidence, note V to art. 8, says: "I have heard Willes J. rule that they were on several occasions, vouching Parke B. as his authority." And after stating that Bramwell B. had been in the habit of admitting the whole of the complaint, Sir James Stephen adds his own view that such practice is certainly in accordance with common sense. Two reported cases were brought to our notice in which this view was acted upon. In *Reg.* v. *Eyre* (1), decided in 1860, tried before Byles J., on a trial for rape, the prosecutrix being examined in chief was asked whether she had made any complaint, and what she said. To an objection made by the prisoner's counsel, Byles J. said, "Whatsoever she said immediately after the occasion, and what was said to her in answer, is equally evidence": the latter part of this ruling is open to question. In *Reg.* v. *Wood* (2), decided in 1877, tried before Bramwell L.J. at Chester, the prosecutrix gave evidence that the prisoner came to a room in an inn where she was barmaid when she was alone, committed a rape upon her, and then left the house, and that an hour and a half afterwards a customer came in, to whom she made a complaint, mentioning the prisoner's name in connection with it. It was proposed for the prosecution to ask her what she said to the customer, and his reply. Bramwell L.J. said: "I shall admit the conversation; you give evidence of a complaint being made, and use the name of the prisoner, leaving it to the jury to infer that the girl said that he had committed the offence that we are now trying him for. I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such testimony." The girl then told in minute detail the particulars of all that had, as she alleged, been done to her by the prisoner, and the customer's replies to her story. This customer was also called, and spoke again in detail as to the complaint.

I am not aware of any other cases directly bearing upon the question before us. Many others were cited, all of which we

(1) 2 F. & F. 579. (2) 14 Cox, 46.

have examined; but finding that they were decided upon other principles of the law of evidence than that which governs the present case, and that they render no assistance to us in our consideration of it, we abstain from any discussion or expression of opinion upon them.

After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them, and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? For it must be borne in mind that if such evidence is inadmissible when offered by the prosecution, the jury cannot alter the rule of evidence and make it admissible by asking for it themselves.

In reality, affirmative answers to such stereotyped questions as these, "Did the prosecutrix make a complaint" (a very leading question, by the way) "of something done to herself?" "Did she mention a name?" amount to nothing to which any

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weight ought to be attached; they tend rather to embarrass than assist a thoughtful jury, for they are consistent either with there having been a complaint or no complaint of the prisoner's conduct. To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand and in the cognizance of the witness in the box. In our opinion, nothing ought unnecessarily to be left to speculation or surmise.

It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be more protected than they are under the present usage. For when the whole statement is laid before the jury they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused. Moreover, the present usage and consequent uncertainty in practice (for the usage is not universal) provokes many objections to the evidence on the part of the prisoner's counsel, and these are generally looked upon with disfavour by the jury, and the very object of confining the evidence of the complaint to the few stereotyped questions we have referred to is often defeated by a device, not to be encouraged, by which the name of the accused, though carefully concealed as an inadmissible particular of the complaint, is studiously revealed to the jury by some such question and answer as the following: "*Q.* In consequence of that complaint did you do anything? *A.* Yes, I went to the house of the prisoner's mother, where he lives, and accused him." This seems to us to be an objectionable mode of introducing

evidence indirectly, which if tendered directly would be inadmissible. We are aware that Patteson J. is reported in *Rex* v. *Wink* (1), decided in 1834, to have suggested that such a mode of obtaining the evidence might be adopted; but we cannot help thinking that there must be some inaccuracy in the report, and the suggestion did not meet with the approval of Cresswell J. in *Reg.* v. *Osborne* (2), or of Brett J. in *Reg.* v. *Taylor* (3), decided in 1874, nor can we approve it.

In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution, and that the evidence in this case was, therefore, properly admitted. The conviction must be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitors for prisoner: *Williams & Son, Lincoln.*

W. J. B.

THE SMELTING COMPANY OF AUSTRALIA, LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

1896
May 14, 22.

Revenue—Stamp—Conveyance on Sale—Colonial Patent—Licence to use Patent in Colony—"Property locally situate out of the United Kingdom"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

A share in a patent granted in New South Wales, and a sole licence to use in a specified district of New South Wales the invention protected by the patent, are "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and do not come within the exception in that sub-section in favour of "lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom." An agreement made in England for the sale of the share in the patent and of the licence is, therefore, liable to ad valorem stamp duty under that sub-section as though it were an actual conveyance on sale.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

(1) 6 C. & P. 397. (2) C. & M. 622.
(3) 13 Cox, 77.

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The instrument presented for the opinion of the commissioners was an agreement under seal made and executed in England, bearing date August 1, 1895, and made between the Camden Syndicate, Limited, of the one part, and the appellants of the other part. The Camden Syndicate and the appellants were respectively companies incorporated under the Companies Acts, having registered offices and carrying on business in England. By the instrument it was agreed that the syndicate should sell and the appellants should purchase the rights and properties the particulars whereof were specified in the schedule thereto annexed, the consideration being fixed at 300,000*l.*, to be paid partly in cash and partly in shares. The appellants satisfied the commissioners that all the rights and properties mentioned in the schedule, except those secondly and thirdly therein mentioned, came within one or other of the exceptions contained in s. 59, sub-s. 1, of the Stamp Act, 1891, and were therefore exempt from the duty imposed by that sub-section. The proportion of the consideration attributable to the rights and properties so exempt was 250,000*l.*, leaving the sum of 50,000*l.* attributable to the properties secondly and thirdly described. These last-mentioned rights and properties consisted of the benefit of a sole licence which had been granted to the syndicate to use in the Illawarra district of New South Wales the invention protected by a patent granted in New South Wales, subject to a royalty on every ton of ore treated under the invention, and also one equal half-share or interest in the said patent, and in all improvements thereof which might be thereafter patented by the owners thereof.

By an indenture dated November 26, 1895, executed in Australia, the rights and properties secondly and thirdly described were assigned to the appellants: this indenture was stamped in accordance with the law of New South Wales with a stamp duty of 250*l.*, being colonial stamp duty on the consideration of 50,000*l.*

The commissioners were of opinion that the rights conferred by the said patent and licence were respectively interests in property within the meaning of s. 59, sub-s. 1, of the

Stamp Act, 1891, and that the appellants had failed to shew that the same came within any of the classes of property which under the terms of the said sub-section were excepted from liability to duty thereunder. They therefore held that the instrument was chargeable under that section and sub-section with the duty chargeable under the head "Conveyance on Sale" in the first schedule to the Stamp Act, 1891, and assessed such duty at 250*l.*, being 5*s.* for every 50*l.* of 50,000*l.*, the portion of the total consideration which was attributable thereto. They were further of opinion that, in respect of the rights and properties other than those secondly and thirdly described, the instrument was liable to a duty of 10*s.* The appellants, being dissatisfied with the assessment so far as regarded the duty of 250*l.*, required the commissioners to state a case. The questions for the opinion of the Court were, whether the instrument was chargeable with the duties of 250*l.* and 10*s.* in accordance with the assessment of the commissioners, and, if not, with what duty it was chargeable. (1)

A. T. Lawrence (*Leslie* with him), for the appellants. The conveyance of the half-share of the patent and of the licence to use it is not liable to ad valorem stamp duty under s. 59 of the Stamp Act, 1891. The section was intended to meet cases where the parties are content to rely upon the agreement made between them, and to dispense with a formal conveyance, and it was further intended that duty should not be payable under it twice over in respect of one transfer of the same property; here, however, there has been a conveyance executed in New South Wales upon which ad valorem duty to the same amount as the

(1) By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59, sub-s. 1, "Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

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English duty has already been paid; and if the Crown are right in their contention, double duty will have to be paid in respect of the same transaction. Admitting that the half-share in the patent is "property" within the meaning of the Stamp Acts, it nevertheless comes within the exception in sub-s. 1 as being property locally situate out of the United Kingdom. Looking at the language of the section, it clearly intends to except from its operation, first, real estate, and, secondly, all property locally situate out of the United Kingdom, whether real or personal.

The words "locally situate," which might be omitted without altering the meaning of the sub-section, are applicable to the conception of property in a patent. The patent has no validity in this country; it is in the nature of an exclusive privilege, and gives certain rights in a particular district of New South Wales, and may be said to savour of the locality within which alone those rights can be exercised. This view is strengthened by the provisions of the New South Wales legislature as to patents. By statute 16 Vict. No. 24, letters of registration could be granted to inventors, and by the amending Act, 51 Vict. No. 3, letters patent may be granted, which must be registered in the registry within the colony before they are actually issued; the letters patent are therefore locally situate within the colony. If the patent itself is property locally situate in New South Wales, then, a fortiori, a licence to use it in that colony is also locally situate there; but, further, a licence, unless coupled with a grant, is not property at all: *Heap* v. *Hartley* (1); *Limmer Asphalte Co.* v. *Commissioners of Inland Revenue.* (2) [He also cited *Attorney-General* v. *Bouwens.* (3)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Danckwerts* with him), for the respondents. First, both the patent and the licence to use it are "property" within the meaning of the Stamp Act, 1891, and are within the broad definition of "property," contained in *Potter* v. *Commissioners of Inland Revenue.* (4) In that case an assignment of the goodwill of a

(1) 42 Ch. D. 461.
(2) L. R. 7 Ex. 211.
(3) 4 M. & W. 171.
(4) 10 Ex. 147.

business was held to be a conveyance of property; the conveyance of a licence to use a patent is an a fortiori case. Such a licence, excluding as it does the right of the rest of the world to use the patent, might be of the highest value, and it would be startling to an ordinary man of business if he were told that it was not property. *Limmer Asphalte Co.* v. *Commissioners of Inland Revenue* (1) is not in point: that case only decided that the particular instrument purported to convey something in which the parties conveying had no property. *Heap* v. *Hartley* (2) decides no more than that a licensee cannot sue for infringement of his rights in his own name. Secondly, neither the patent nor the licence to use it comes within the exception. The words "locally situate out of the United Kingdom" have no relation to personal property: they refer to real or heritable property only. It cannot be said that a contract is locally situate in a particular district, although its sphere of operation is confined to that district, and the licence is nothing more than personal property which is to be enjoyed in a particular district and not elsewhere.

A. T. Lawrence, in reply.

Cur. adv. vult.

May 22. POLLOCK B. The question raised by this case is whether an agreement for the sale of a sole licence to exercise a colonial patent in a certain district in New South Wales, and of a half-share in the patent, is the subject-matter of stamp duty under s. 59, sub-s. 1, of the Stamp Act, 1891, and the first point that we have to determine is whether this "licence" is "property" at all, it being admitted that the patent itself comes within the meaning of that expression. The word "property" is one of very general meaning and comprehensiveness, and, passing by the definitions of it to be found in the dictionaries, there are many decided cases which shew that the word as used in this agreement is well within the meaning of this statute. In *Birchall* v. *Pugin* (3) the defendant in the action had previously recovered a sum of money in an action, and the

(1) L. R. 7 Ex. 211. (2) 42 Ch. D. 461.
(3) L. R. 10 C. P. 397.

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defendant's attorney in that action had taken out a summons for an order charging his costs upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum so recovered by the defendant in execution. The parties then went before a judge at chambers, the attorney claiming to have a charging order upon the judgment debt as property recovered, and the judge made an order in his favour, and on appeal to the Court, Lord Coleridge C.J. said: "One objection made by the counsel for Birchall was that the sum in question was not 'property' recovered within the meaning of 23 & 24 Vict. c. 127, s. 28. I am of opinion that that objection cannot prevail. The words used in the section are of the widest possible character, and include all property of whatsoever kind: not only property known to the common law, but property of every kind. It seems to me that this is property of some kind: it is a chose in action." And certainly, if it were asked whether, if a person who had bought this licence had an interest that could be called property in the ordinary meaning of the word as used by laymen, there could be no doubt about it. Further, in *Potter* v. *Commissioners of Inland Revenue* (1), it was held that the goodwill of a business was property.

It has been often said by judges of very great experience that, in construing Acts relating to the revenue, the popular sense of words rather than their strict legal meaning should be looked at, and the reason for that is obvious. The object of taxing Acts has nothing to do with the strict legal meaning of words, unless the words used are words of art, such as words which describe an estate in real property, or technical terms peculiar to English law. This is well put in Maxwell on Statutes, especially at p. 29 (2), where it is said that, in order to arrive at the real meaning of a statute, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act.

Cases were cited to us to shew that this particular licence could not be called "property," and the one upon which most

(1) 10 Ex. 147. (2) 3rd edition.

stress was laid was *Heap* v. *Hartley*. (1) The case of *Muskett* v. *Hill* (2) is so fully discussed in *Heap* v. *Hartley* (1) that I need only quote the following reference to it by Cotton L.J. (3), where he cites the following passage from the judgment of Lord Hatherley in *Newby* v. *Harrison* (4): "With regard to the word 'licence' there is some little ambiguity. It is, however, well defined in the case of *Muskett* v. *Hill* (2), and I prefer stating it in the language there cited by Tindal C.J. to giving my own." It is to be observed that the language is not that of Tindal C.J. himself, but is cited from an older case; the description of a licence is this: "a dispensation or licence properly passes no interest, but only makes an action lawful which without it had been unlawful." Then he goes on to instance a licence to hunt in a man's park, which is a licence only, but, if coupled with a right to carry away the deer killed, amounts to a grant. In *Heap* v. *Hartley* (1) it was held that an exclusive licence is a leave to do a thing, and a contract not to allow any one else to do it, but that, unless coupled with a grant, it conferred no more than any other licence any interest or property in the thing, and the licensee had no title to sue in his own name. That decision, like that of *Muskett* v. *Hill* (2), depends upon technical rules of law which in no way assist one in coming to a conclusion as to the meaning of the word "property" in this case. Speaking for myself, I have no doubt that, looking at the object and scope of this statute, the word "property" does include this licence.

Then we come to an exception in favour of "lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom." It is well known that there can be no locality of a debt. It is said that the person of a creditor draws to him, wherever he may be, the debt, and there is a great deal of learning on that subject in various decisions in the Ecclesiastical Courts when discussing the question of the jurisdiction to grant probate. But that law is not applicable to the present case, and the only question is, Can this licence be said to be property in itself which is locally situate out of the

(1) 42 Ch. D. 461.
(2) 5 Bing. N. C. 694.
(3) 42 Ch. D. at p. 468.
(4) 1 J. & H. 393.

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United Kingdom? The expression "locally situate" seems to be applicable properly to lands, tenements, hereditaments, or heritages; but there may be other property ejusdem generis (quasi-real property it has sometimes been called) which may fitly be said to be locally situate out of the United Kingdom, and therefore the expression "locally situate" may be necessary for the purpose of carrying out the object of the Act. But to say that that expression applies to something which in truth and fact has no locality is a mistake, and that is not the construction which we can give to this Act. In the result, therefore, I have come to the conclusion that this particular licence is "property," and is therefore the subject-matter of the stamp duty, and that it is not property which is locally situate so as to be within the exception.

BRUCE J. I am of the same opinion. I think that the benefit of a sole licence to use a patent invention in a specific district is an interest in property within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891. The authorities referred to by my learned brother are, I think, sufficient, if, indeed, authorities are needed, to establish that the words "any property whatsoever" used in the enacting part of that sub-section are wide enough to include such rights as those in question. Whether the interest of the appellants in improvements in the patent which may be hereafter patented is an interest in property may be open to doubt; but it is not necessary to decide that point.

Then arises the question whether the interest of the appellants in the licence and patent comes within the exception. I think that it does not. The exception is in these words: "except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom." The words "lands, tenements, hereditaments" I think are used here to relate to lands and interests arising out of land; they are terms of English law, and are intended by this sub-section to include all such rights arising out of land as are known to and recognised by English law. The word "heritages" is a term of Scottish property law, and I think it is used here to

include all such rights arising out of land as are known to and recognised by Scottish law. But lest in dealing with rights of property beyond the United Kingdom the terms of English and Scottish law should not be comprehensive enough to include rights arising out of land recognised by other systems of law, the word "property" is added to the exception; and I think that that word is used in the exception to indicate rights of the same class and description as the preceding words. The words "locally situate" govern the whole exception, and shew that the Legislature is dealing only with such rights of property as issue out of land, or are connected with the user or enjoyment of land, and so may be said to have a local situation. What is manifestly intended is to exempt such property as is known to jurists as immoveable property, if situate out of the United Kingdom.

Judgment for the respondents.

Solicitors for appellants: *Ince, Colt & Ince.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

CLIFFORD AND ANOTHER *v.* COMMISSIONERS OF INLAND REVENUE.

1896
May 14, 22.

Revenue—Stamp—Agreement in consideration of Fixed Weekly Payments—"Bond, Covenant, or Instrument"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched.*

By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2*s.* 6*d.* for every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable.

By an agreement under seal between the owner and the manager of a hotel, the manager was until determination of the agreement to carry on

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the business of hotel proprietor, and to have entire control of the business without interference by the owner; he was to receive the whole of the receipts and profits, to pay all necessary outgoings, and to pay to the owner a fixed sum per week. No period was fixed for the duration of the agreement, which contained powers for its determination by either party in certain events; it was ipso facto to determine on the death of the manager. The agreement was not to operate as a demise to the manager, nor to constitute a partnership between the parties:—

Held, that the agreement was a security for an indefinite period for a sum of money at weekly periods, and not for an annuity or yearly sum payable by weekly instalments, and was therefore liable to ad valorem duty upon the sum agreed to be paid weekly, and not upon the total amount of such weekly payments for a year.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument presented for the opinion of the commissioners was dated April 29, 1895, and was an agreement under seal relating to a hotel in London; it was made between Louisa Clifford, one of the appellants, and therein called the owner, of the first part, Frank Hawkins, the other appellant, therein called the manager, of the second part, and two sureties for Hawkins of the third part; by it, in consideration of 500*l.* paid to Mrs. Clifford by Hawkins, each of them entered into certain covenants with the other as therein set forth. The material provisions of the agreement were shortly as follows: Clauses 1 and 2 provided that the manager should with the permission of the owner carry on the business of hotel proprietor at the hotel from April 29, 1895, until the agreement should be determined under some provision thereinafter contained, and should have the use of certain furniture, pictures, fittings, and effects therein, and provide certain other goods and furniture at his own expense. Clause 4 provided that, subject to a power of inspection and a provision for the use of two rooms (hereinafter referred to), the manager should have the entire management, conduct, and control of the hotel and business without any interference by the owner, and should have the sole power of engaging and discharging all servants and other persons employed in the business. Clause 5 provided that the owner and her nominee should have the exclusive use free of charge of a bedroom and sitting-room, and that when the owner should not require the

use of the rooms the manager should pay her 5*l.* a week in addition to the weekly payments provided by the next clause. By clause 6 the manager was to be entitled to receive the whole of the receipts and profits of the business, and was to pay all necessary outgoings; he was to pay to the owner 108*l.* 18*s.* per week, and also (but in the name of the owner) to pay the ground-rent and rent, insurance premiums, excise and other licences, and all rates and taxes. Clauses 9 to 24 provided that the manager should at his own cost keep the premises, furniture, and effects in good order and repair, and should pay all insurance premiums. Clause 25 contained power for the owner to re-enter on non-payment of any weekly payment within seven days, or on breach of covenants by the manager. Clause 29 contained power for the owner, if she should desire to sell the hotel, to determine the agreement upon giving the manager one calendar month's notice. Clause 30 contained power for the owner at any time, and for the manager after the expiration of three years, to determine the agreement by three calendar months' written notice. Clause 33 provided that the agreement should determine on the death of the manager. Clause 35 provided that the agreement should not operate as a demise to the manager of the hotel and premises. Clause 37 provided that nothing in the agreement contained should be construed or taken to constitute a partnership between the owner and the manager. By clause 42 the sureties covenanted with the owner that the manager would perform the covenants in the agreement, and that they would indemnify the owner to the extent of 500*l.*

The commissioners, having regard to clauses 35 and 37, considered that they were precluded from regarding the instrument as chargeable with stamp duty either as a lease or as a deed of partnership; they were of opinion that it was the only or principal or primary security for the sums of 5662*l.* 16*s.* and 260*l.*, payable annually respectively for an indefinite period by weekly payments of 108*l.* 18*s.* and 5*l.* respectively; that such sums were neither interest for any principal sums secured by a duly stamped instrument, nor rent reserved by a lease or tack; and that the instrument was chargeable with stamp duty under the heading "Bond, covenant, or instrument of any kind

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whatsoever," in the 1st schedule to the Stamp Act, 1891, with the duties of 141*l.* 12*s.* 6*d.* and 6*l.* 10*s.* respectively, being the ad valorem duty of 2*s.* 6*d.* for every 5*l.* and any fractional part of 5*l.* of the respective annual sums of 5662*l.* 16*s.* and 260*l.*, the sums periodically payable by the manager to the owner, and also under the head "Deed of any kind whatsoever not described in the schedule," in the said 1st schedule with the duty of 10*s.*

The questions for the opinion of the Court were—whether the instrument was chargeable with the duties of 141*l.* 12*s.* 6*d.*, 6*l.* 10*s.*, and 10*s.* in accordance with the assessment of the commissioners, and, if not, with what duty the instrument was chargeable.

A. T. Lawrence, for the appellants. The agreement is not the only or principal or primary security for an annuity. It is admittedly an agreement for an indefinite period; but it does not purport to deal with an annuity or with annual payments; had the manager died upon the day after the agreement was signed, it would have ipso facto been determined. Owing to the uncertainty as to the period during which the agreement may last, the parties have themselves stipulated for weekly payments, and there is nothing in the agreement to shew that they contemplated or intended annual payments by weekly instalments. The stamp duty should be assessed upon the sum "periodically payable"—that is, upon the sum payable weekly. The section itself contemplates the case of agreements which do not last a year; it includes not only instruments which are the security for an annuity, but also "for any sum or sums of money at stated periods": these words clearly contemplate something distinct from an annuity, and the decision of the commissioners gives no weight to them.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Danckwerts* with him), for the commissioners. The commissioners were right. Looked at as a whole, the agreement is one for an indefinite period, and is intended to provide for a yearly sum to be paid by the manager to the owner, the actual payments being made weekly. The case is really governed by the deci-

sions in *Jones* v. *Commissioners of Inland Revenue* (1) and *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* (1), where instruments which provided for payment of the consideration by quarterly payments were held to be chargeable with ad valorem stamp duty upon the same principle as that which has been here acted upon. If the appellants are right, the shorter the periods at which payment is to be made the less will be the stamp duty, and parties to such agreements will be able to deprive the revenue of duty by fixing the payments at short intervals.

A. T. Lawrence, in reply.

Cur. adv. vult.

May 22. POLLOCK B. I am of opinion that this appeal must be allowed. The instrument in question comes within the title, "Bond, covenant, or instrument of any kind whatsoever" in the 1st schedule to the Stamp Act, 1891. Under the 1st sub-section of that title a duty is imposed upon instruments which are the only or principal or primary security for an annuity, or for any sum or sums of money at stated periods, not being interest nor rent; the sub-section then goes on to deal with two classes of cases, the first, where the amount is payable for a definite and certain period, so that the total amount to be paid can be ascertained—in which case the duty payable is the same ad valorem duty as would be payable on a bond or covenant for the total amount; the second, where the payments are for the term of life or any other indefinite period —in which case the duty is 2*s.* 6*d.* for every 5*l.* and for any fractional part of 5*l.* of the annuity or sum periodically payable. The instrument which, in the opinion of the commissioners, must be stamped under that provision is a somewhat peculiar one, though perfectly simple to understand. It is made between the two appellants, and makes provision for the carrying on of a hotel, the gist of it being that Hawkins, with the permission of Mrs. Clifford, is to carry on the business of a hotel proprietor. Then, subject to a power of inspection and a provision

(1) [1895] 1 Q. B. 484.

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for the use of two rooms which are reserved for the owner, the manager is to have the sole control and management of the hotel; and there are provisions with respect to the division of profits, and so forth; it is further provided that the agreement is not to operate as a demise of the hotel to the manager, and that it shall not constitute a partnership between the owner and the manager. The view taken by the commissioners is that the instrument is the only or principal or primary security for the sums of 5662*l.* 16*s.* and 260*l.* respectively, payable annually for an indefinite period by weekly payments of 108*l.* 18*s.* and 5*l.* respectively, and that it is chargeable with the ad valorem duty of 2*s.* 6*d.* for every 5*l.* of those two sums, and also, under the head "Deed of any kind whatsoever not described in the schedule," with a further duty of 10*s.* The ground of their decision is that this is an instrument under which payments are to be made for an indefinite period, and in that they are right; for although the instrument contains provisions with regard to the death of the manager and with regard to the determination of the agreement by notice, until one of those events happens the manager is to pay the owner the 108*l.* 18*s.* every week.

Now, the mode in which the commissioners have dealt with the case is this. They say the deed contemplates payments being made for an indefinite period, and that they are therefore entitled to treat it as if it were a yearly annuity or a yearly payment to be made under a bond or deed for an indefinite period, the actual payments being merely weekly. One of their reasons for adopting this view is that in their opinion it is clear that the duty of 2*s.* 6*d.* is based upon the supposition that it is a yearly payment, and that, reading that in with the charging words in s. 1, the object of the statute is to give a certain fixed ad valorem duty, which is fixed upon the assumption that the agreement is one for a yearly period. That, however, is to my mind not a satisfactory way of dealing with statutes of this nature.

It is stated in Maxwell on Statutes, 1st ed. p. 259 (1), that

(1) See 3rd ed. p. 401.

"Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt." For this proposition several decisions and dicta are cited, and there is no doubt as to its being a correct statement of the law. Of course the learned author does not mean to say that where the plain language of a statute imposes a tax or duty any court is to construe it according to any other principle than they would apply to the construction of another statute. Again, the statute must be so construed as to carry out the plain object of the Act. But if the statute is so indefinite and uncertain that it can be treated in two ways, and the true construction of it is open to two views, the one more favourable to the Crown and the other to the subject, then the latter construction should be adopted. In the present case I certainly think that the commissioners have taken a very far-fetched view in the construction of this statute when they come to apply it to this particular instrument. There is not a single word in the deed itself which contemplates an annual payment; the sum to be paid is throughout described as the sum of 108*l.* 18*s.* per week, and there is no provision pointing to any payment other than a weekly payment. Looking at the schedule it is quite clear that it deals in the first instance with an annuity, which, ex vi termini, means an annual payment, and then it deals with any other instrument which is a security of the same kind which requires an annual payment. Then it goes on to deal with instruments which provide for a payment for a definite and certain period generally, and then with those which provide for payment for the term of life or any other indefinite period, clearly meaning that an annual payment is provided for in the instrument itself: that is quite clear from the words "for every 5*l.* and also for any fractional part of 5*l.* of the annuity or sum periodically payable." When is this sum periodically payable? Clearly by the week, and not by the year. Apart, therefore, from

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Pollock B.

authority, it seems clear to me that this is not an instrument within this section which can be treated as an annual instrument to which the duty of 2*s.* 6*d.* on every 5*l.* can be applicable, except upon one single payment, and then it is applicable as coming within the words "for every 5*l.* and also for any fractional part of 5*l.* of the annuity or sum periodically payable."

During the argument authorities were cited to the contrary; but the only ones that have any real bearing on the present case are the two cases of *Jones* v. *Commissioners of Inland Revenue* (1) and the *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* (1), which were argued and reported together. In the former of these cases the agreement was one between a theatrical ticket agent and a telephone company to supply telephonic communication between the ticket agent's head office and other places, and the company undertook to erect and maintain in working order the telephone lines and all other necessary apparatus, and the ticket agent covenanted to pay by quarterly instalments in advance to the company an annual sum per line. That clearly indicated that the sum payable was an annual sum, although it was provided that it should be paid by quarterly instalments. In the other case the agreement was between a railway company and an automatic machine company, whereby the former agreed to permit the latter to place on their platforms their machines, and the automatic company agreed to pay to the railway company a yearly rent by equal quarterly payments on the usual quarter days. In both those cases it was held that the agreement was a security for a sum of money at stated periods for an indefinite period, and that the stated periods were annual periods; and the decisions seem to have been perfectly right, because the words used in the first case are that an annual sum is to be paid, and in the second the words "yearly rent" are used. I see no difficulty in applying the Act to those cases in the way in which it was applied by the Court.

But in the present case we find nothing in contemplation but a weekly payment. And it must not be forgotten that by

(1) [1895] 1 Q. B. 484.

this Act, and by the words "annuity or sum periodically payable," the commissioners get a benefit which they otherwise might not have—that is to say, there are a great many agreements of this kind which are for a shorter period than a year, and would not come within the old provision for annuity deeds, and upon these agreements the commissioners now get 2*s.* 6*d.* upon every 5*l.*, whatever the amount secured by the agreement may be, stamp duty being thus paid in cases where otherwise it would not be payable. It seems to me, therefore, that in the present case the sum which is payable every week is that which is properly chargeable with stamp duty, and no other sum. The present assessment, therefore, cannot stand, and the assessment must be made upon that weekly payment.

BRUCE J. I agree. The instrument in question in this case is a security for sums of money at stated periods, not being interest nor rent. The sums of money payable under clause 6 of the instrument are not payable for a definite and certain period. There is no term fixed for the duration of the agreement, and there are many contingencies on the happening of any one of which the agreement may be put an end to. The agreement is for an indefinite period, in which case the duty is to be assessed upon the sum periodically payable. The sum periodically payable is 108*l.* 18*s.*, and it is upon that sum that the duty should be charged. I see no reasonable ground for the contention that the aggregate of the periodical payments for a whole year is to be taken as the amount upon which the duty is to be assessed. There is nothing in the words of the instrument to indicate a yearly payment. The provision of the schedule to the Act seems to me to be framed specially with the view to include cases where the periods of payment are less than a year. It was intended that where the sum secured is payable for any indefinite period, though for less than a year, the duty should still be payable in respect of the sum periodically payable. The expression "the sum periodically payable" must mean the sum payable at the periods stated in the instrument; and in the present case the periods are weekly periods,

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and the duty must be assessed upon the amount of the weekly payment.

Judgment for the appellants.

Solicitors for appellants : *Burton, Yeates & Hart.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

W. J. B.

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May 18.

KILLICK *v.* GRAHAM.
LINTERN *v.* BURCHELL.

Revenue—Excise—Licence to deal in Plate—Secretary of Watch Club—Inland Revenue Act, 1867 (30 & 31 *Vict. c.* 90), *ss.* 1, 3, 17.

By s. 17 of the Inland Revenue Act, 1867, a penalty is imposed upon persons soliciting, taking, or receiving orders for articles, for the dealing in, retailing or selling which an excise licence is required, without having in force a proper excise licence, with a proviso that the section is not to be deemed to impose a penalty upon a bonâ fide traveller taking orders for goods which his employer is duly licensed to deal in or sell.

A watchmaker in London, holding an excise licence to deal in plate at his place of business in London, was the proprietor of a "watch club" in a provincial town. The secretary of the club, a clerk in the town, obtained members from among his fellow employees, receiving from each member a weekly subscription, which he forwarded to the watchmaker. A ballot was held at intervals among the members; the member who was successful at the ballot chose a watch from a catalogue of the watchmaker's goods; the secretary communicated his choice to the watchmaker and received from him a watch, which he handed over to the member. The secretary, who had no excise licence to deal in plate, was paid by the watchmaker a commission upon the amount collected by him:—

Held, that the secretary of the club was a person soliciting, taking, or receiving orders for an exciseable article without having in force a proper excise licence within the meaning of the above section, and that he did not come within the proviso in favour of bonâ fide travellers therein contained.

THESE two appeals were heard together, the facts being similar.

KILLICK *v.* GRAHAM.

Case stated by justices for the borough of Bedford.

An information had been preferred by the appellant, an officer of Inland Revenue, against the respondent for having

in the month of July, 1895, dealt in plate without having in force a proper licence. The penalty sought to be recovered was the penalty of 50*l.* imposed by 30 & 31 Vict. c. 90, s. 3. (1)

The respondent was a clerk in the post-office at Bedford, and was also secretary to the City of London Watch Club, of which Mr. H. E. Peck, a watchmaker in London, was the proprietor. One Gaunt was a telegraph messenger in the post-office at Bedford, and was a member of the club, and had a watch from the respondent under the following circumstances. Gaunt entered the club, and was accepted as a member on February 2, 1895; he paid his first subscription on that day, and received from the respondent a card, on which the subscriptions paid by him were marked as they were paid; thirty subscriptions of 1*s.* each were paid by him, 1*s.* being paid each week to the respondent; and in consequence of having paid those subscriptions Gaunt received a watch from the respondent. The respondent had previously asked Gaunt what he should want, and the latter had said a silver watch, which was received by him before he had completed payment, about five subscriptions having been paid by him after receipt of the watch. The members of the club ballotted every month with dice for the right to choose an article, and about a week after he was successful at the ballot Gaunt received the watch. The entries of subscriptions were signed by the respondent, and when Gaunt paid his last subscription the respondent wrote across the card, "Settled 31 Aug. /95 F. F. G. for H. E. Peck." The respondent, who, to the knowledge of Gaunt, was not a watchmaker or dealer in watches, received the subscription on behalf of Mr. Peck; Gaunt was entitled to select any article he liked, and might have had a microscope or a bag for clothes, nothing being said about a watch until he had had his successful draw; the respondent did not ask him to order a watch. The respondent kept nothing in stock, and the course of business was that Gaunt's wish would be communicated by the respondent

(1) By 30 & 31 Vict. c. 90, s. 3, "Every person who shall do any act, or carry on any trade or business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorizing him so to do, shall for every offence forfeit the sum of fifty pounds . . . ."

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to Peck; the respondent told Gaunt that he would get the watch for him. The respondent had stated to the appellant that he acted as secretary of the club and as agent to Peck for the supply of watches, microscopes, bags, and other articles, and that he received a small commission from Peck for any article supplied through him.

On the part of the respondent it was contended that he, being secretary to the club, was not within 30 & 31 Vict. c. 90, s. 17 (1), and the justices dismissed the information upon that ground.

The question of law for the opinion of the Court was whether the respondent, being secretary to the club, was a person requiring a licence as a dealer in plate.

LINTERN *v.* BURCHELL.

Case stated by justices for the county of Southampton.

The information was similar to that in *Killick* v. *Graham*. The facts were that the respondent, who was in the employ of a fellmonger at Havant, having been requested to do so by or on behalf of one Yabsley, a licensed dealer in plate, carrying on business at Ludgate Hill, formed a club amongst his fellow-workmen upon certain rules printed upon the card of membership, he being allowed as remuneration for its management and for collecting the members' subscriptions a commission of 20 per cent. upon the amount collected by him and remitted to Yabsley. The club might consist of an unlimited number of persons. In April, 1895, one Cole, a fellow-workman of the

(1) By 30 & 31 Vict. c. 90, s. 17, "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorizing him so to do, he shall forfeit the penalty imposed by law upon a person dealing in, retailing, or selling such article without having an excise licence in force authorizing him so to do .... Provided always that nothing herein contained shall be deemed .... to impose a penalty upon a bonâ fide traveller taking orders for goods which his employer is duly licensed to deal in or sell." By s. 1 of the same statute an excise licence must be taken out by "every person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or other place in which his trade or business shall be carried on."

respondent, became a member of the club at his suggestion, receiving a membership card from him, and making his first payment of 1*s.* to the respondent on April 27; Cole paid the same sum weekly until November 18. In August a "draw" was held, at which Cole was declared the successful member, and from an illustrated catalogue of articles on sale by Yabsley, which was shewn to him by the respondent, he selected a silver watch. A few days afterwards the respondent handed him a watch and a warranty annexed thereto purporting to come from Yabsley. The respondent received his commission from Yabsley. Cole had no direct communication whatever with Yabsley; his transactions with the respondent were conducted on their employer's premises; the draw took place at the respondent's house. The respondent held no licence to deal in plate.

On behalf of the appellant it was contended that the respondent had sold the watch to Cole at Havant, and that he required a licence to deal in plate to enable him to sell it; on behalf of the respondent, that, as secretary of the club, he was not a dealer in plate, and was not a person requiring a licence as such.

The justices were of opinion that the respondent was not the seller of the watch within the meaning of the statute, and accordingly dismissed the information.

The questions for the opinion of the Court were—

(*a*) Whether upon the facts as stated the decision of the justices was right in point of law.

(*b*) Whether by reason of the transactions between himself and Cole the respondent incurred the penalty imposed by 30 & 31 Vict. c. 90, s. 3.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Danckwerts* with him), for the appellant in each case. The effect of such transactions as the present is that the licence-holder establishes a branch, selling the watches on commission to the person who works the branch; the latter sells them to the members of the club. Whether the facts are looked at in the light of s. 1 or s. 17 of the Act, the respondent is equally liable to a penalty: he has traded in or sold articles composed of silver

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without having a licence, which is forbidden by the former section, and he has solicited, taken, or received an order for an article for the dealing in which an excise licence is by law required within the meaning of the latter. If the respondent was the servant of the proprietor, it affords him no defence, but he may be convicted as the seller: *Hotchin* v. *Hindmarsh* (1); nor does the using of the machinery of a club give him any protection: *Bowyer* v. *Percy Supper Club*. (2) The decisions in *Pletts* v. *Campbell* (3) and *Pletts* v. *Beattie* (4) shew that the sales took place in each instance on the premises where the business of these clubs was transacted.

Joseph Walton, Q.C. (*Hextall* with him), for the respondent in each case. The justices were right. Admitting that there was no sale by the club, the respondent has not brought himself within the provisions of the Act. The case does not fall within s. 1, which contemplates a business of selling plate that is carried on at a place of business; here, what the respondent has done does not amount to a sale, nor is it done at a place of business, for he has none within the meaning of that section: he may be a buyer of watches, but is not a seller. Nor does the case fall within s. 17, which was intended to prevent a man who had a licensed place of business from setting up branches under the care or managements of agents not holding licences. Even a traveller for a firm holding an excise licence is not brought within s. 17 by reason of his having an office where he takes orders for his principals: *Stuchbery* v. *Spencer*. (5) There is nothing to make the respondent liable unless he comes within the prohibition against soliciting orders in s. 17; and this he does as a traveller or agent, and is therefore exempt. Being a penal section, s. 17 must be strictly construed.

The Solicitor-General, in reply. The respondent gets his commission, not as a buyer of watches or as a member of the club, but as a seller of the watches. He comes within s. 1, because he procures the orders from the members, and effects the sale. There is no difference in principle between the

(1) [1891] 2 Q. B. 181.
(2) [1893] 2 Q. B. 154.
(3) [1895] 2 Q. B. 229.
(4) [1896] 1 Q. B. 519.
(5) 55 L. J. (M.C.) 141; 51 J. P. 181.

respondent starting a club and his opening a small shop for the sale of the London dealer's watches, when he would obviously be within s. 1; it is a mere difference of machinery. If not within s. 1, the respondent is within s. 17: he clearly solicited orders for watches, and he is not within the exception in favour of bonâ fide travellers, for he does not in fact travel. That section clearly indicates that it is not necessary that there should be any recognised place of business; what it deals with is the soliciting, getting, or receiving of orders.

GRANTHAM J. I must confess to having had considerable difficulty in coming to a conclusion in this case; but, upon the whole, I think that, whatever may be the liability of the respondents under ss. 1 and 3 of the Act, they cannot get out of the liability imposed by s. 17. That section seems to be intended to include cases like the present, where people endeavour, I do not say improperly, to extend their business for the sale of exciseable goods without paying any further licence duty. Finding that people did solicit orders largely throughout England in the course of their business, paying only a small licence duty to the revenue, the Legislature thought it necessary to prevent that practice, and to make such persons liable to licence duty in any place where they actually obtained orders for goods, the general scope of s. 17 being to impose the liability to licence duty upon the person who obtained the order whether he had a house for the purpose of carrying on the business or not; his liability was to be the same as though he had dealt with the goods in a particular house. But had the section stopped there its operation would have included commercial travellers exercising their legitimate and well known trade, and the Legislature therefore inserted a proviso that the section should not apply to a bonâ fide traveller taking orders for goods which his employer was duly licensed to deal in or to sell. In the present case I must confess that I cannot bring the respondents within the term "bonâ fide traveller," which is a term of trade well known to mean a man who does in fact travel about the country soliciting orders which he sends up to his employer for execution. I do not think that, within the

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meaning of the section, these persons are bonâ fide travellers, but they do solicit, take, or receive orders for watches. Their business is to ask others to join a club by which the members may obtain a watch; it is true that other articles may be obtained, but primarily it is a club for obtaining watches, for it is kept up by a watchmaker, and the possibility of obtaining other articles seems to be introduced for the purpose of preventing the application of this Act. Now, in each of these cases an agent is employed by the watchmaker to go about and solicit people to pay money in for a watch, paying 1*s.* a week for thirty weeks for a watch to cost 30*s.*, and by taking this money weekly the agent does receive an order for the watch. It is true that for the purpose of attracting members of this club there is a ballot introduced by which, if there are as many as thirty members, the lucky man can get his watch or other exciseable article of the value of 30*s.* at once. How does he get it? The article is sent through the agent, who, having received the money for it, gets the order for this exciseable article, which is sent down to him from London and handed by him to the member of the club.

Under these circumstances I have come to the conclusion that the respondents are persons soliciting, taking, or receiving orders for these particular goods. In the one case the respondent is a telegraph clerk, and in the other a fellmonger, and I cannot see that they can properly be called travellers. In the latter case the respondent did not cease to be a fellmonger; he worked in a fellmonger's yard; the collection was made in the yard, the ballot took place in his house, and he cannot come within the exception in favour of bonâ fide travellers. Both respondents are persons who have solicited, taken, or received an order for an exciseable article, and though I have no wish by my decision to do anything which would in any way limit or fetter legitimate trade, I am compelled to come to the conclusion that they fall within the prohibition contained in s. 17, and the appeal must therefore be allowed.

COLLINS J. I am of the same opinion. As we are differing from the justices, I will add a few words to the judgment of my

learned brother. My mind has vacillated a great deal during the argument, because it seems to me essential that the Crown in taking penal proceedings should make the case absolutely clear; and so far as their case rests on ss. 1 and 3 of the Act, I must say that I am not satisfied that they have made out that the respondents did trade in or sell any of the exciseable articles under s. 1, nor that they carried on a trade or business under s. 3. But as regards s. 17 I feel much greater difficulty, for I have not felt at all clear that what the respondents do, though it may be within the letter, is really within the spirit of the Act. It would, I think, have been perfectly possible for the watchmaker in London to do all that has been done here had he employed (as he may possibly do hereafter if his business extends) some person to go round week by week and do week by week what is now done by a person living on the spot. That would, I think, be nothing more than soliciting orders in such a way as travellers solicit them, and a person so soliciting them would in point of fact be a person who spent the greater part of his time in so doing; in such a case there would, in my opinion, be nothing that the Crown could lay hold of.

Does, then, the present case fall within s. 17? When we see what is done with regard to the formation of these clubs it is clear that the club is rather an elaborate piece of machinery to bring about an order from some person to the watchmaker for a watch, the particular person being chosen by ballot. The secretary is paid a commission, for which he undertakes to organise a club and to induce persons to subscribe to it, and to establish rules whereby automatically a fund is procured large enough to result in an order for a watch for a particular person, a member of the club; when that order is given and the money sent, and not till then, the agent receives remuneration in the shape of commission; the continuous hope of commission on his part keeps the club moving. The sale by the watchmaker to the member is brought about through the agency of the secretary, who therefore, it seems to me, comes within the first part of s. 17 as being a person who solicits an order for an exciseable article.

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Collins J.

I quite agree with what my learned brother has said as to s. 17. It seems to be primarily addressed to the case of a man having a good licence himself, and who possibly could not be hit under ss. 1 and 3 as trading, or selling, without a licence, but who solicits orders in a place for which he has no licence; such a person, of course, comes directly within the provisions of s. 17. The words of that section are, however, large enough to include primâ facie a person soliciting orders on behalf of another person, which other person has himself a licence; therefore at the end of the section the Legislature has excepted the case of a bonâ fide traveller taking orders for goods which his employer is duly licensed to deal in or sell. I must say that I was somewhat impressed by the ingenious argument for the respondents on that part of the case, because I think that what the Legislature was aiming at is not really what appears from the language used in this section. Obviously they contemplated as lawful that a man who took out a licence in one part of the kingdom should be at liberty to send round agents to other parts of the kingdom to solicit orders: in such a case the trader is not to be hampered by the necessity of taking out a licence in every place where orders are solicited on his behalf. Here the place where the orders are solicited is a place other than that where the employer's business is carried on, and they are solicited by a person who casually meets at his workshop, or place of business, different workmen or fellow clerks whom he induces to join the club; and in that sense the thing done is little, if at all, more than what would ordinarily be done by a traveller, if the person who solicited the orders could be so described. I think, however, that the facts before us are too strong to admit of the respondents being called travellers: in the one case the respondent lives at a place where his work as a fellmonger is carried on, and his only travel, so far as I can see, consists in soliciting the persons who work in the same shop to join the club; and there is no distinction in the case of the post-office clerk. I think, therefore, that it would be straining the words "bonâ fide traveller" too far if we were to hold that the respondents came within the exception; and, not coming within the exception, they fall under the general prohibition

in the earlier part of the section. I agree, therefore, that these cases must go back to the justices with an intimation that they ought to have convicted the respondents.

Judgment in each case for appellant.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitor for respondents: *H. E. Tudor, for Conquest & Clare, Bedford.*

W. J. B.

BRADFORD *v.* MAYOR, &c., OF EASTBOURNE.

1896
May 15;
June 18.

Local Government—Drain or Sewer—Single Drain draining several Houses—Liability to Repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe passing through private property had, from a date prior to 1890, received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority of the district, who had adopted the Public Health Acts Amendment Act, 1890, gave the owners of the said houses notice under s. 41 of the Public Health Act, 1875, to repair it, and, on failure of the owners to comply with the notice, executed the necessary work themselves, and claimed to recover from the owners the expenses incurred by them in so doing:—

Held, that the pipe in question was a "single private drain" within the meaning of s. 19 of the first-mentioned Act, and that the local authority were entitled to recover.

Self v. *Hove Commissioners* ([1895] 1 Q. B. 685) followed.

Hill v. *Hair* ([1895] 1 Q. B. 906) disapproved.

APPEAL from the county court of Sussex.

The respondents are the local authority for the urban district of Eastbourne. The appellant is the owner of a house, No. 14, Little North Street, within the respondents' district. The said house was one of six houses belonging to different owners, which were, and had been from a date prior to 1890, connected with a public sewer by means of a single drain-pipe, which ran through private property until it reached the road in which the sewer was situated. The pipe having become a nuisance and injurious to health, the respondents, who had adopted Parts I. and III. of the Public Health Acts Amendment Act, 1890, including

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s. 19, gave notice in writing to the appellant and the owners of the other five houses under s. 41 of the Public Health Act, 1875, requiring them to relay the said pipe. The notices not being complied with, the respondents executed the works themselves at a cost of 14*l.* 2*s.* 9*d.* The proportion of the said sum fixed by the respondents' surveyor as payable by the appellant was 2*l.* 7*s.* 2*d.*, of which sum the respondents accordingly demanded payment. The appellant having disputed his liability, the respondents brought an action in the county court to recover the amount demanded. The judge gave judgment for the respondents considering himself bound by the decision in *Self* v. *Hove Commissioners*. (1) The appellant appealed.

Macmorran, Q.C., for the appellant. The drain-pipe in question was constructed and used for the drainage of more buildings than one, not being within the same curtilage. It therefore was from the date of its construction a "sewer" within the definition of that term in s. 4 of the Public Health Act, 1875, and none the less so because it was made on private land: *Travis* v. *Uttley*. (2) It therefore became vested in the local authority under s. 13, and the obligation to repair it was imposed upon them under ss. 15, 19 of that Act. Sect. 19 of the Public Health Acts Amendment Act, 1890 (3) cannot have

(1) [1895] 1 Q. B. 685.

(2) [1894] 1 Q. B. 233.

(3) By s. 19 of the Public Health Acts Amendment Act, 1890—

"(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction.

"(2.) Such expenses may be recovered summarily, or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly.

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41—

"On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise) the local

the effect of transferring obligations which have already vested. That section must be read as prospective only, and not as applying to sewers already in existence at the date when that Act was passed. The decision in *Self* v. *Hove Commissioners* (1) cannot be supported. It is inconsistent with the later case of *Hill* v. *Hair* (2), which is directly in point in the appellant's favour.

Boxall, for the respondents. *Self* v. *Hove Commissioners* (1) was rightly decided. *Travis* v. *Uttley* (3) is not in point, for there the houses did not belong to different owners, and, consequently, s. 19 of the Act of 1890 had no application. In *Hill* v. *Hair* (2) the proceedings were not under s. 41 of the Act of 1875, but under s. 95; whereas s. 19 of the Act of 1890 relates only to complaints under s. 41. If the limited interpretation suggested by Cave J. in that case is to be given to the expression "single private drain" in s. 19, sub-s. 1, the enactment in sub-s. 3 is wholly superfluous. The language of s. 19 of the Act of 1890, which applies the provisions of s. 41 of the Act of 1875 to cases "where two or more houses . . . . *are* connected, &c.," shews that the section was to apply to drains existing at the date of the Act as well as to drains thereafter to be made. The decisions under the Metropolis Management Acts, cited in *Hill* v. *Hair* (2), are not in point, as those Acts did not contain

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authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. . . . . If the drain, water closet, earth-closet, privy, ashpit, or cesspool on examination appear to be in a bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works, and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

(1) [1895] 1 Q. B. 685.
(2) [1895] 1 Q. B. 906.
(3) [1894] 1 Q. B. 233.

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any provision corresponding to s. 19, sub-s. 3, of the Act of 1890. [He also referred to *Minehead Local Board* v. *Luttrell.* (1)]

Macmorran, Q.C., in reply, referred to *Hornsey Local Board* v. *Davis.* (2)

Cur. adv. vult.

June 18. The following written judgments were delivered :—

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the decision of the county court judge of Eastbourne, in an action brought by the corporation of Eastbourne against one Bradford to recover the sum of 2*l.* 7*s.* 2*d.*, which is a proportion of certain expenses incurred in relaying a drain connecting a house belonging to the defendant, and other houses belonging to different owners, with a public sewer. The drain in question drains houses Nos. 13, 11, 9, and 7 in the Pevensey Road, and Nos. 13 and 14 in Little North Street, and, passing through private property, it joins the main public sewer in Susan's Road. The facts were agreed upon by the parties, and the only question for the decision of the county court judge was whether the conduit in question is a public sewer within the meaning of the Public Health Acts, 1875 and 1890, or a single private drain within the meaning of s. 19 of the Act of 1890. The learned county court judge considered himself bound by the decision of the Divisional Court in the case of *Self* v. *Hove Commissioners* (3), and held that the drain was a single private drain, and judgment was given for the plaintiff corporation with leave to appeal.

On the argument before us, the cases of *Travis* v. *Uttley* (4) and *Self* v. *Hove Commissioners* (3) and *Hill* v. *Hair* (5) were cited. In *Travis* v. *Uttley* (4) the drain passed through private ground and received the drainage of three houses before it joined the main sewer ; but the three houses so drained belonged to *one person*, consequently s. 19 of the Act of 1890 did not apply. It was there held that the conduit, so far as it was in question in that case, was a sewer repairable by the public

(1) [1894] 2 Ch. 178.
(2) [1893] 1 Q. B. 756.
(3) (1895] 1 Q. B. 685.
(4) [1894] 1 Q. B. 233.
(5) [1895] 1 Q. B. 906.

authority. I think the judgments in that case were right. I say nothing about some expressions appearing in those judgments which were incidental, and were not necessary for the purposes of the decision arrived at. In the case of *Self* v. *Hove Commissioners* (1), two houses belonging to *different* owners were connected with a public sewer by a single private drain. This was, therefore, held to be a drain within the meaning of s. 19 of the Public Health Act, 1890; and, as the local authority had adopted Part III. of the Act of 1890, s. 19 applied. In the case of *Hill* v. *Hair* (2) the drain was similar to that in *Self* v. *Hove Commissioners* (1)—a drain carrying the drainage of the respondent's house and of other houses belonging to different owners into a public sewer. Here, also, the local authority had adopted the Act of 1890; but the Court held that s. 19 of that Act did not apply. In these two cases, therefore, different and conflicting decisions were given. There is no substantial difference between the drain in the case before us and those in *Self* v. *Hove Commissioners* (1) and *Hill* v. *Hair*. (2) In the present case it drains houses belonging to different owners before it enters the public sewer, and the local authority has adopted the Act of 1890. In consequence of the impossibility of reconciling the decisions in *Self* v. *Hove Commissioners* (1) and *Hill* v. *Hair* (2), I have reconsidered the whole question independently of those cases.

The real question is, What is the proper application of s. 19 of the Public Health Act, 1890? The section says that where two or more houses belonging to different owners are connected with the public sewer by a single private drain, the local authority may deal with that drain in the same way both as to the execution of works and recovery of expenses as it may deal with drains, ashpits, and cesspools under s. 41 of the Public Health Act, 1875. The first point of difficulty is, What is a "single private drain"? Sub-s. 3 of s. 19 says that a "drain" includes a drain used for the drainage of more than one building. This very much widens the definition of drain given in s. 4 of the Act of 1875. In that section a "drain" means "any drain of and used for the drainage of one building only, or premises within

(1) [1895] 1 Q. B. 685. (2) [1895] 1 Q. B. 906.

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the same curtilage." What, then, is the meaning in s. 19 of the words "single private drain"? What is a *private drain*, and can there be a *private drain* connecting two or more houses (belonging to different owners) with a public sewer? Prior to the passing of the Act of 1890, by the operation of the Act of 1875 (and indeed by the operation of the prior Act of 1848), there could not be a private drain which connected two or more houses (belonging to different owners) with a public sewer, because any such drain was a sewer, and was a sewer vested in the local authority. Therefore, it might be said that the drain in this case is not a private drain because it was vested in the local authority—if the word "private" is to be taken as used in the sense of belonging to an individual; and it was not a drain at all, because it came under the definition of sewer in s. 4 of the Act of 1875, and in s. 2 of the Act of 1848. But the Act of 1890, *for the purposes of s.* 19 *and for those purposes only*, widens the definition of "drain" contained in s. 4 of the Act of 1875. And therefore there seems to be no difficulty in interpreting s. 19 with regard to the word "drain." In the case before us it seems to me to be clear that the drain was a drain within the meaning of the definition given in sub-s. 3 of s. 19. The next question is, What is the meaning of the word "private" in "single private drain," and what meaning can be given to it which shall harmonize with the application of s. 13 of the Public Health Act, 1875? It has been suggested that the expression "private drain" might be said to apply only to drains of the character set out in s. 19 of the Act of 1890 which were constructed after the passing of the Act of 1890—in other words, that the Act had no retrospective force. That would be a very simple way of getting out of the difficulties of the section. But the words of the section are not "shall be," but "are"; and therefore when it says that where two or more houses belonging to different owners *are* connected with the public sewer, it points, I think, to a state of things in existence at the time of the passing of the Act, which is to be altered. If the provision is retrospective, what effect is to be given to s. 13 of the Act of 1875 in this connection? Now, that section (s. 13) says that all existing and future sewers shall vest in and

be under the control of the local authority. The word "sewer" here will no longer include *the drain in question in this case*, which is a drain under and for the purposes only of s. 19 of the Act of 1890. But inasmuch as prior to the passing of the Act of 1890 that drain was a sewer vesting in the local authority, does the vesting control the natural application of the new definition? If, indeed, the absolute property in the sewer were given by s. 13 of the Act of 1875 to the local authority, one might feel some difficulty in making this section applicable to drains constructed prior to 1890 notwithstanding the word "are." But what is the meaning of the word "vest" in s. 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter: *Coverdale* v. *Charlton* (1); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2); *Attorney-General* v. *Guardians of Dorking* (3); *Mayor, &c., of Birkenhead* v. *London and North Western Ry. Co.* (4) But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word *vest* gives to the local authority disappears to the same extent. Therefore, it does not appear that there is any difficulty arising from the word "vest" in s. 13 of the Act of 1875. The vesting was only for the purpose of performing a duty, and the duty having ex hypothesi been shifted on to the owner, there is no difficulty in arriving at the proper interpretation of s. 19 of the Act of 1890 by reason of the use of the word "vest" in s. 13 of the Act of 1875. I am unable to see any special use in the word "private" in this section; but it is intelligible, and I think means a drain originally constructed for the drainage of one or more houses, as distinguished from a drain or sewer which any member of the public may have a right to use by connecting with it the drain from his own house. We must put some reasonable interpretation on the section, and, on this construction of it, there is no

(1) 4 Q. B. D. 104.
(2) 14 Ch. D. 785.
(3) 20 Ch. D. 595.
(4) 15 Q. B. D. 572.

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difficulty in applying it to the present case. If it does not govern the class of drain in this case, which is for all purposes identical with that in *Self* v. *Hove Commissioners* (1) and in *Hill* v. *Hair* (2), what application can the section have? A drain now, by the combined operation of s. 4 of the Public Health Act, 1875, and s. 19 of the Act of 1890, for the purposes of this latter section, and for those purposes only, includes (1.) a drain used for the drainage of one building only, (2.) a drain used for the drainage of premises within the same curtilage, and (3.) a drain used for the drainage of more than one building. The section, therefore, applies to two or more houses belonging to different owners connected with a public sewer by a single private drain—whether within the same curtilage or not. If it was only intended to apply to drains which did not vest in the local authority prior to 1890, it is difficult to understand the object of making a new definition of the word "drain" for the purposes of applying s. 41 of the Act of 1875. The local authorities could already deal with drains draining one building, and drains draining premises within the same curtilage; see s. 4 of the Act of 1875 and s. 41 of the same Act. Moreover, the object of s. 19 of the Act of 1890 is to give increased power to the local authorities enumerated in the Act, and therefore the second exception under the definition of sewer in s. 4 of the Act of 1875 does not help us, especially as the class of drains there mentioned are not sewers. Further, since it is intended to throw upon *owners of houses* certain expenses, it is difficult to suppose that the section can have been intended to operate on the first exception to s. 13 of the Act of 1875, namely, sewers made for profit. It is difficult to suppose that the Legislature intended that the *owners of houses* are to be called upon to pay the costs of repairing a sewage system such as that in *Minehead Local Board* v. *Luttrell*. (3) The second exception of s. 13 of the Act of 1875 affords no assistance, as it deals with land drainage; neither does the third exception, because the local authority can have no power over these sewers except as provided by s. 327, sub-s. 1. Nor does

(1) [1895] 1 Q. B. 685. (2) [1895] 1 Q. B. 906.
(3) [1894] 2 Ch. 178.

the proviso of s. 13 help us, as it points to public sewers constructed by a public body for public use. It appears to me to follow that the section could practically have no operation at all if it were not intended to apply to such cases as that before us. I am therefore of opinion that in this case the drain was a single private drain connecting two or more houses belonging to different owners with a public sewer, and that therefore, under s. 19 of the Act of 1890, the local authority was entitled to proceed under s. 41 of the Act of 1875. I agree in the decision in *Self* v. *Hove Commissioners* (1), and I think the county court judge was right in following it. It follows that I do not agree with the judgment in *Hill* v. *Hair*. (2) I may add that I think it is to be regretted that the Legislature did not pass some such provision as clause 134 of the Carlisle Corporation Act, cited in *Hill* v. *Hair* (2), instead of a section limited as s. 19 of the Act of 1890 is. Had they done so, drains like that in *Travis* v. *Uttley* (3) would have stood on the same footing as the drain in this case. I cannot avoid pointing out the highly unsatisfactory state of the existing legislation relating to the question of public health, and to cognate questions of local authority under the Acts dealing with that subject. It is entirely unsystematic and most confused, and in the public interest steps ought to be speedily taken to reduce the existing chaos into system and order.

WILLS J. The plaintiffs in this case are the local sanitary authority of the borough of Eastbourne, and they have under the provisions of s. 3 of 53 & 54 Vict. c. 59 (Public Health Act, 1890), adopted among other provisions of that Act s. 19, which is therefore in force in that borough. The defendant is the owner of a house which is connected with the public sewer by a pipe or conduit which, passing through private property, receives the drainage both of the defendant's house and of several other houses belonging to different owners. This pipe has become a nuisance and injurious to health, and the plaintiffs took the necessary steps, and all things happened to entitle

(1) [1895] 1 Q. B. 685. (2) [1895] 1 Q. B. 906.
(3) [1894] 1 Q. B. 233.

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them to execute the works necessary to abate the nuisance. The proportion of the total cost to be charged to the defendant has been ascertained as provided by s. 19 of the Act of 1890, and this action is brought in the county court by virtue of s. 261 of the Act of 1875. If the Act of 1875 alone were applicable, the pipe in question, from the point, at all events, where it receives the drainage of the second house, would be a "sewer" within the interpretation clause (s. 4). Sect. 19, however, of the Act of 1890 is the enactment applicable to this case. By that section it is provided that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred upon them by that section from the owners of the houses" in shares or proportions to be adjudged, as therein provided, to each owner respectively. As in the Public Health Act, 1890, "drain" and "sewer" are, where the context does not require otherwise, to have the same meaning as in the Act of 1875, this enactment, read with the interpretation clause of the Act of 1875, would involve a contradiction in terms; for the single private conduit carrying the drainage of two houses would be excluded from the definition of drain, and fall within that of a sewer. It is, therefore, a case in which the context *does* require that the word "drain" in s. 19 should not receive the statutory definition. But the Legislature has not left this matter to inference, and has provided by sub-s. 3 of the same section that "for the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." The section, therefore, seems to me to say in terms that the definition of drain in the Public Health Act of 1875 is not to prevent the words of the section from receiving their natural interpretation, and that for the purposes of that section and of that section *only* the definition of "drain" in the Act of 1875 shall be qualified in the manner and to the extent pointed out in sub-s. 3. I do not apprehend, therefore, that the use of the expression "*private* drain connecting two

or more houses with the public sewer" effects any change in the ownership of the conduit which serves two houses, or prevents it from being, for any other purposes than those covered by s. 19, a sewer and not a drain. But for the purposes of this section I cannot see why there is any difficulty in giving to the language used its natural meaning, and saying that in such a case as the present the section is directly applicable, and does, so far as proceedings under s. 41 of the Act of 1875 are concerned, and to that extent and in that case only, alter the incidence of the cost of executing the necessary works contemplated by that section, and throw them upon the owner. In the remarks of the Lord Chief Justice as to the meaning and application of the expression "vest" I entirely agree. It may be asked, What is the meaning of a "private drain" serving two houses when, the moment it serves two houses, it becomes, so far as ownership is concerned, public property? It seems to me that the section itself shews clearly enough what is meant. The "private drain" is contrasted with the "public sewer." The public sewer is obviously meant here to indicate a sewer which serves the public generally, and has or may have an indefinite number of houses connected with it, either directly or because branch sewers come into it; whereas the "private drain" serving two or more houses is that of which the natural use is confined to those houses, and with which other houses belonging to other owners could not be connected without the consent of the persons through whose land it runs. The provision so understood does not seem unreasonable. A drain of this character is generally an economical substitute for separate drains from each of the houses served by it to the public sewer. As a general rule, no public use can be made of such a drain, and there does not seem any reason in the nature of things why the owners of houses so drained should, by reason of the mere fact that two or more of them use the same private drain, escape the burden which would fall upon them if each house ran its drain direct into the public sewer. I do not mean to say that the scheme is complete or logical. If two or more houses situated as those in the present case belonged to one owner this section would not apply, and yet there is no reason

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of justice or policy which can be urged in support of such distinctive treatment. The truth is, that the whole of our sanitary legislation is in a state which I hardly like to characterise in the language that naturally suggests itself; and the attempt to extract from the various details of the legislation a set of harmonious principles always underlying the specific provisions is, I am afraid, futile. It has been suggested that s. 19 might have been intended to apply to buildings and drains not existing at the time the Act was passed, but I do not think there is anything in the language to point to such an interpretation. The words are, "where two or more houses belonging to different owners *are*"—not "shall be"—"connected with a single private drain, &c.," and I think it was intended, to the limited extent to which s. 19 is confined, to alter the law which existed at the date of the passing of the Act of 1890 with respect to houses and drains then existing as well as with respect to such as should thereafter be constructed. The present case is entirely within the decision in *Self* v. *Hove Commissioners*. (1) Under ordinary circumstances no more need have been said in this court. That case is an authority which we ought to follow unless and until overruled by the Court of Appeal. But I have discussed the question de novo out of respect to the judgment of my brothers Cave and Lawrance in *Hill* v. *Hair*. (2) The facts of the case make it substantially undistinguishable from the present case. It is true that it is not stated that the proceedings were those authorized by s. 19 of the Act of 1890, and the notice mentioned in the report as having been given by the local authority looks rather more like one under s. 94 than one under s. 41 of the Public Health Act of 1875; but no such distinction was made in the arguments or the judgment, and my brother Cave expressed in very unmistakable language his opinion that the decision in *Self* v. *Hove Commissioners* (1), and especially my judgment, were wrong, not to say very wrong indeed. This expression of his opinion has led me to review the whole question, with the result I have already stated. My brother Cave thinks that it was not intended to alter the law with respect to drains which

(1) [1895] 1 Q. B. 685. (2) [1895] 1 Q. B. 906.

by virtue of the general provisions of the Public Health Act, 1875, were sewers, and that not only did they remain vested in and under the control of the local authority and generally repairable at their expense, but that the removal of nuisances arising in them could not be dealt with under s. 19 of the Act of 1890, and that as a consequence the cost of such works as the present case deals with cannot be thrown upon the owner. He recognises that s. 19 of the Act of 1890 requires some subject-matter to operate upon, but thinks that such subject-matter is confined to sewers made for private profit (which under s. 13 of the Act of 1875 do not vest in the local authority), and to drains or sewers used for draining premises within the same curtilage, which under s. 4 fall within the description of drains. But as s. 19 is confined to the case of a private drain serving two or more houses *belonging to different owners*—a part of the phraseology of s. 19 which appears to have escaped the notice of my brother Cave—it can hardly be applicable to a drain serving premises within the same curtilage, and the class of sewers made by any person for his own profit seems according to the authorities to be of a kind totally different from any that are the least likely to come within the operation of s. 19 of the Act of 1890: see *Ferrand* v. *Hallas Land and Building Co.* (1); *Minehead Local Board* v. *Luttrell* (2); *Acton Local Board* v. *Batten* (3); *Pinnock* v. *Waterworth.* (4) If it be possible to conceive a case in which a sewer constructed by any one for his own profit could fall within the scope of s. 19, the operation of the section would be reduced to limits of the very narrowest possible kind; and I find it difficult to concur with my brother Cave in thinking that the possible existence of such a case can be an adequate reason for the legislation effected by s. 19. It is to be observed that sub-s. 3 of s. 19, if one may judge from the reports of *Hill* v. *Hair* (5) in the LAW REPORTS and in the *Law Journal* (6), does not seem to have been successfully pressed upon my learned brother's attention. A good deal has been said in the course of the argument about *Travis*

(1) [1893] 2 Q. B. 135.
(2) [1894] 2 Ch. 178.
(3) 28 Ch. D. 283.
(4) 51 J. P. 248.
(5) [1895] 1 Q. B. 906.
(6) 64 L. J. (M.C.) 164.

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v. *Uttley*. (1) But it appears to me to be a case having no bearing upon the present case. I have referred to the special case filed in the Court, and I find that the facts of that case were that three houses, numbered respectively 109, 107, and 105, were served by one common pipe or conduit which received the drainage first from 109, then of No. 107, and then of No. 105. This common conduit ran into the public sewer. It was defective below 109, so that the sewerage leaked into the cellars of Nos. 107 and 105. Proceedings were taken by the inspector of nuisances against the respondent, who was the owner of all the three houses, under ss. 91–94 of the Act of 1875, on the ground that upon his premises was this "drain"—as it was alleged to be—which was in such a state as to be injurious to health. The magistrates dismissed the information on the ground that the nuisance arose, not from a defective *drain*, but from a defective *sewer*, and that the respondent, therefore, was not liable. The Divisional Court, consisting of my brother Wright and myself, upheld their decision, and dismissed the appeal. The judgment was clearly right. The place where the nuisance existed was below the junction of the drain from the second house. The plans which formed part of the case seem to me to make this perfectly clear. There is an expression in my judgment which my brother Cave and myself have very recently decided to be erroneous. I have said that "it is impossible to say that the part which is used for the drainage of one building is a drain and the rest a sewer, the drain is a sewer from end to end." In *Kershaw* v. *Taylor* (2), however, the Court of Appeal decided that under such circumstances the same conduit was a drain so long as it received the drainage of one house only, but a sewer from the point where the drainage of the second house came into the conduit. The passage, therefore, which I have cited from my judgment in *Travis* v. *Uttley* (1) must be considered as erroneous. It was not necessary for the judgment, and the correction does not affect the decision. The error, however, in the obiter dictum, and the decision itself, are alike foreign to the present inquiry. *Travis* v. *Uttley* (1) has nothing to do with s. 19 of the Act of 1890, and it has no

(1) [1894] 1 Q. B. 233. (2) [1895] 2 Q. B. 471.

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bearing at all upon the present case. *Self* v. *Hove Commissioners* (1), unless it is to be discarded, is a decision precisely in point with respect to the present case. For the reasons I have given, I think that it was rightly decided; and as the learned Lord Chief Justice has come to the same conclusions, there is no reason for departing from the usual course of treating it as an authority to be followed. This appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Lawson Lewis, Eastbourne.*

Solicitors for respondents: *Sharpe, Parker & Co., for Town Clerk, Eastbourne.*

J. F. C.

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May 11; *June* 18.

Local Government — New Streets — Street Sewers — Main Outfall Sewer — Expense of Constructing — Building Plans — Refusal of Local Authority to Approve — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 150, 157, 277.

An owner of land in a rural sanitary district, who proposed to lay it out as a building estate and to erect on it blocks of houses arranged in streets, deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the soil of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, and also the necessary main outfall sewer:—

Held, that the local authority were not entitled to attach such a condition to their approval.

RULE for a mandamus to the Tynemouth Rural District Council to approve plans of proposed new buildings.

In the year 1894 Lord Hastings, who is the owner of certain land situate at Seaton Delaval, in the county of Northumberland, and within the district of the Tynemouth Rural District Council, proposed to lay it out as a building estate. He accordingly deposited with the council, in pursuance of their by-laws in that behalf, certain plans shewing the new streets proposed to

(1) [1895] 1 Q. B. 685.

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be laid out, and also certain other plans shewing certain of the new houses proposed to be erected, namely, a block of seven houses to be erected in a proposed new street called Avenue Road. To the said house plans he appended a note in the following terms: "It is proposed that the street and outfall sewers should be made by the rural district council, and not by the landowner." The council approved the street plans, but refused to approve the house plans upon the following grounds: "Disapproved of until it is shewn into what sewer or other means of drainage the house drains are to communicate and empty, and for want of a proper and sufficient mode of drainage and sewerage. The council object to the proposal that they should make the street and outfall sewers except under agreement with and at the expense of the landowner or the depositor of these plans. Otherwise than this, the council require the same to be made by such landowner or depositor."

By an order of the Local Government Board dated December 28, 1874, the guardians of the Tynemouth Union, being the rural sanitary authority of the union, were invested with all the powers, rights, and duties of an urban sanitary authority in respect (inter alia) to the various matters mentioned in s. 34 of the Local Government Act, 1858. By the Public Health Act, 1875, the Local Government Act, 1858, was repealed, and the provisions of s. 34 of the latter Act were re-enacted in substantially the same terms in s. 157 of the former Act, which provides that, "Every urban authority may make by-laws with respect to the following matters—that is to say: (1.) with respect to the level, width and construction of new streets, and provisions for the sewerage thereof; . . . . (4.) With respect to the drainage of buildings; . . . . and they may further provide for the observance of such by-laws by enacting therein such provisions as they think necessary . . . . as to the deposit of plans and sections by persons intending to lay out streets or construct buildings." And by s. 313 of the Public Health Act, 1875, it was provided that where in any order of the Local Government Board any provisions of any Sanitary Act repealed by that Act are referred to, such order should be read as if the corresponding provisions of the

repealing Act were referred to in the order and were substituted for the repealed provisions. In 1887 the guardians of the Tynemouth Union, under their powers contained in the above order, made certain by-laws with respect to the drainage of buildings and with respect to the deposit of plans by persons intending to lay out streets and construct buildings; but they made no by-laws with respect to the provisions for the sewerage of new streets under sub-s. 1 of s. 157. By s. 25 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the powers and duties of the guardians of the Tynemouth Union were transferred to the Tynemouth Rural District Council. The said council have not obtained any order of the Local Government Board giving them the powers of an urban authority to carry out the provisions of s. 150 of the Public Health Act, 1875, with regard to the sewering of new streets. It was admitted that the sewage of the buildings which Lord Hastings proposed to erect could be effectually dealt with only by means of sewers, and that a system of drainage into cesspools was unsuited to the locality.

A rule nisi having been obtained for a mandamus to compel the council to approve the house plans so submitted to them,

Lawson Walton, *Q.C.*, and *Willes Chitty*, for the district council, shewed cause. The landowner was bound to shew how he dealt with the sewage of his buildings. By-law 92 of the council's by-laws provides that every person who shall intend to erect a building shall deliver to the sanitary authority a description in writing "of the intended mode of drainage." To satisfy that by-law the builder must shew with what sewers his house-drains are to be connected. A drain which terminates abruptly in the soil is not a sufficient drain. If there are no sewers in existence he must make them. The owner of land in a rural district cannot by laying it out as a building estate cast upon the local authority the burden of making sewers. The district as it now exists requires no sewers, and as the alteration in the character of the district is for the benefit of the landowner alone, the burden ought to fall upon him.

Robson, *Q.C.*, and *Alexander Glen*, in support of the rule.

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If the local authority wish to cast the expense of making the sewers of these new streets upon the landowner, there are two courses open to them: they may obtain from the Local Government Board the powers of an urban authority under s. 150 of the Public Health Act, 1875, and then, when the streets are laid out, they may under that section require the owner of the land adjoining the streets to pay for the expense of sewering them; or they may make a by-law under sub-s. 1 of s. 157 to the same effect. But they have done neither. There is nothing in the existing by-laws which says that the plans shall shew the sewers. And if the plans are in conformity with the by-laws there is no ground for withholding approval of them. The landowner is in this case willing to make the sewers of the streets which are on his own land, but he objects to being called upon to pay the expense of making an outfall sewer off his land. The only means by which the local authority can impose upon him the expense of a main outfall sewer is by getting the approval of the Local Government Board to a resolution constituting this building estate a special drainage district under s. 277 of the Act of 1875. And the effect of that would be to relieve him from further contributions to the sewers rate of the other portions of the Tynemouth rural district.

Cur. adv. vult.

June 18. LORD RUSSELL of KILLOWEN C.J. This was an application for a mandamus directed to the Tynemouth Rural District Council commanding them to approve of certain building plans submitted to them as the local authority of the district by the applicant. I have come to the conclusion that the mandamus ought to go.

The applicant is the owner of certain land within the district. He proposed to build upon it a considerable number of houses arranged in streets, and submitted to the council the plans of the proposed buildings, to which plans he appended this note: "N.B. It is proposed that the street and outfall sewers should be made by the rural district council, and not by the landowner." So far as the buildings themselves were con-

cerned, no objection was taken to the plans by the council. But they disapproved of the plans upon grounds which are indicated in a memorandum indorsed on the plans, and which is to the following effect: "Disapproved of until it is shewn into what sewer or other means of drainage the house drains are to communicate and empty, and for want of a proper and sufficient mode of drainage and sewerage. The council object to the proposal that they should make the street and outfall sewers except under agreement with and at the expense of the landowner or depositor of the plans. Otherwise than this, the council require the same to be made by such landowner or depositor." It will thus be seen that the question in dispute between the parties is whether the applicant on the one hand, or the local authority on the other, is to be liable in the future to make the sewers down the streets with which the drains of the various houses are to communicate, and also to make the ultimate outfall sewer which is to deal with the collected sewage from such street sewers. Now, the state of the case is this. The local authority made certain by-laws with respect to the deposited plans by persons intending to lay out new streets; but there is nothing in those by-laws which requires the building owner to shew upon the face of his plans, or in any way to indicate, what is to be the mode of ultimately dealing with the sewage of his buildings. The by-laws undoubtedly contain provisions that the buildings shall be so constructed as to be capable of being effectually drained, but nothing as to collecting sewers, nor anything about an outfall sewer. The plans put forward shew that the building owner contemplated that there would be down the middle of the intended streets constructed a sewer into which the drains from each of the houses should discharge; and it is not suggested that in any of the plans there are any such levels shewn of the houses relatively to the street as would make the proposed system of drainage, as proposed by the landowner, impossible or impracticable. Now, in that state of things, the question really seems to be this: Can a local authority, who have no objection to the plans of the buildings as such, decline to approve of a building owner's mode of laying out his property

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unless that building owner undertakes to have a system of sewage carried out at his own expense, including an outfall sewer? The owner in the present case was perfectly willing to undertake to bear the expense of the sewers so far as they were within his own property, but he declined to give any undertaking to provide any necessary outfall sewer, and indeed, when one comes to think of it, practically the requisition that he should do so seems to me to be utterly unreasonable, because while the local authority under their statutory powers may take such land as is necessary for the purpose of constructing sewage works, outfall or otherwise, a private person has no such authority at all. He may make the sewers so far as they are within his own property; but, unless he went to Parliament and got authority to take land or purchased it from its owners by agreement at such prices as they chose to demand, he would be utterly powerless to carry out any complete scheme of sewerage. Now the argument between the parties I might briefly state in this way. The local authority say, "You cannot by turning your land into a village or a town put upon us the burthen of dealing with your sewage; you must do that yourself, and you must shew on your plans how you propose to do it." The owner, on the other hand, says, "My duty is to construct drains, not sewers, and although you may by the joint operation of s. 150 and s. 276 of the Public Health Act, 1875, be enabled to put the costs of the sewers, so far as they are on my land, upon me, you cannot require me to construct any outfall sewer should that be necessary; or again, if the facts are sufficient to justify you, you may under s. 277 get my property made a special drainage district, so that the necessary expenses may be charged upon that exclusively." But then it was argued that it would be unreasonable to commit a local authority like this to the cost of a scheme of sewerage which is made merely for the benefit of a landowner in the development of his property. That argument seems to me to be fallacious. The local authority is not called upon, immediately upon the approval of plans contemplating the erection of a great number of buildings, to proceed upon the supposition that the whole of those buildings are going to be carried out.

The thing must be allowed to work itself out in practice. If the building scheme is not carried out, and only a few houses are erected, it might be perfectly possible to deal with the sewage of that limited number of houses by means which need not necessitate or require any expensive scheme of sewerage at all. But once the building scheme does assume large proportions, for which, in the interest of public health, an elaborate sewerage system is required, then it seems to me that what the local authority are entitled to do is to proceed in either of the ways I have pointed out, namely, to put upon the owner the expense of the sewers so far as they are on his own land, dealing themselves with the outfall sewer, or to apply to have the district in question made a special drainage district, with the result that the owner, while bearing the cost of sewering that district, will be exempt from any contribution to the expenses of any drainage system outside that area. But it seems to me impossible to support the view of the local authority that, because the owner has not indicated in his plans the complete drainage system which they require and undertaken to construct it at his own cost, that is a ground for withholding approval of the plans in question. The rule must be made absolute.

WILLS J. The facts of this case are extremely simple; not so, the enactments upon which our decision turns. The applicant is the owner of property in the district of a rural sanitary authority. He desires to put up certain considerable blocks of houses, comprising several streets, in a place which at present is a part of the open country. The defendants are the rural sanitary authority in question. The applicant has submitted to the defendants plans shewing the proposed new streets and containing the details of construction of his proposed buildings, from which it appears that he proposes to construct each house with a separate drain ending at present in each case in the soil of a proposed new street, with no cesspool or other receptacle for drainage. The defendants refuse to approve his plans unless he will agree with them for the construction at his expense of the necessary main sewers—the existence of which his plans contemplate—with the necessary outfall and other

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works. No other objection has been taken to the plans, nor do they contravene either any by-law or any provision of the Sanitary Acts. The applicant asks the Court to grant a mandamus to the defendants requiring them to approve the plans. It is necessary to set out by ascertaining, if that be possible, what the enactments and by-laws are which bear upon the subject. The only enlargement that has been effected of the powers of the defendants as a rural sanitary authority is one conferred upon them by order of the Local Government Board made under the powers of the Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 23, and dated December 28, 1874. That order invested the defendants "with all the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority with reference to making or enforcing by-laws and otherwise in respect of the following matters, viz.: 1. In respect to the various matters mentioned in s. 32 of the Local Government Act, 1858, so far as the powers under that section are not already conferred upon the said sanitary authority in pursuance of s. 8 of the Public Health Act, 1872 (35 & 36 Vict. c. 79), and s. 5 of the Sanitary Act, 1868 (31 & 32 Vict. c. 115). 2. In respect to the various matters mentioned in s. 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), and in s. 44 of the Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89)." A word or two of explanation is necessary. The powers of the Public Health Act, 1848, and of the Local Government Act, 1858, were conferred by Order in Council either upon existing municipal and other corporations, or upon boards of health constituted by Order in Council in particular localities. The Act of 1872 divided the whole country into districts,—urban districts under the jurisdiction of an urban sanitary authority, and rural under the jurisdiction of a rural sanitary authority,—the urban authority being the corporation of corporate towns and cities, improvement commissioners under local Acts, and existing local boards, the rural sanitary authorities being (with some qualifications) the boards of guardians of unions, and the rural sanitary districts being (also with some qualifications) the unions. The powers of urban sanitary authorities were

much more extensive than those of rural authorities, and comprised all the powers vested in local boards under the Acts of 1848 and 1858 (see s. 7 of the Act of 1872). Those of rural authorities were more limited, being confined to powers under the Sewage Utilization Acts, the Nuisances Removal Acts, the Common Lodging House Acts, the Diseases Prevention Act, and the Bakehouse Regulation Act (s. 8 of the same Act). But by s. 23 the Local Government Board could by an order under seal invest the rural authority with any of the powers of an urban authority specified in the order. The order I am now discussing says in a very roundabout fashion, in the first place, that the defendants shall have the powers of a local board under s. 32 of the Act of 1858. None of these, however, touch the present case, except in one matter, presently to be noticed, which may have a slight bearing upon it. The second branch of the order confers upon the defendants the powers of a local board under s. 34 of the Act of 1858 and s. 44 of the Act of 1874. The latter, again, do not concern this case—and, so far as this case is concerned, the defendants had under the order of 1874 only the powers of s. 34 of the Act of 1858—for none of the ordinary powers of a rural sanitary authority under any of the Acts passed before the date of the order of the Local Government Board of December, 1874, enabled them to do anything under which the present question could have arisen, or which has anything to do with this case. Under the applied powers of s. 32 of the Act of 1858 the defendants acquired powers to make by-laws for the cleansing of privies, ashpits, and cesspools, and under the Sanitary Laws Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 21, they became bound to make proper provision for such cleansing. It is an illustration of the tentative character of all sanitary legislation, that I have not been able to find any provision applying to rural authorities only in any of the Acts under which their powers arose up to this time which contains any reference to water-closets. The part of s. 34 of the Local Government Act of 1858 which is material to the present case is that which, as the section is applied, empowers the defendants to make by-laws "with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in

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connection with buildings," and also to "provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings," and as to their power "to remove, alter, or pull down any work begun or done in contravention of such by-laws." The next Act was the Public Health Act of 1875, by which every Act that has been referred to up to this point was repealed with the single exception of the Bakehouse Regulations Act. The repeal, however, was not to affect anything duly done under any of the repealed Acts (s. 343); and by s. 313 of the Act of 1875 it is provided, that where in any order made by the Local Government Board, or in force at the time of the passing of the Act of 1875, any provisions of any of the Sanitary Acts (which term includes those mentioned in the Order of 1874) repealed by this Act are mentioned or referred to, such order shall be read as if the provisions of the Act of 1875 applicable to purposes the same as, or similar to, those of the repealed provisions were therein mentioned or referred to, or were substituted for them. Sect. 157 contains these substituted provisions, and, with two trivial exceptions, they are totidem verbis with those of s. 34 of the Act of 1858, the only difference being that "urban sanitary authority" is substituted for "local board" in the description of the body which can make the by-laws, and that "earth closets" are added in the list of matters as to which by-laws can be made. All local boards became in 1872 urban sanitary authorities; so that practically there is no difference between the two Acts in what is material to the present question.

The by-laws under which the controversy arises came into force in January, 1888. No provision appears in any of the Acts between 1875 and 1888 which affects the present dispute. It is not necessary to go into the details of the by-laws. It is sufficient to say that they contain no rules for determining whether the drainage in any particular case shall be by the construction of or by connection with a sewer, or by a cesspool. They contain provisions for securing that the building shall have such a level as will enable it to be "effectually drained,"

and to have "the requisite communication with any sewer into which such drain may lawfully empty." They contain all necessary provisions where the drainage is to be by cesspool, and all necessary provisions if it is to be by connection with an existing sewer, but none which in terms provide for a case like the present. They contain provisions that the building owner shall deposit plans both of new streets and of new houses, shewing (inter alia) the form and dimensions of every water-closet, earth-closet, privy, ashpit, cesspool, well, and all other appurtenances, "and the intended lines of drainage of the building, and the intended size, depth, and inclination of each drain"; and he is also to deposit "a description in writing of the intended mode of drainage." There is no provision in the by-laws for the approval of the plans by the defendants, or that any penalty shall be incurred by a person who proceeds to build before he has got such approval. If in building he has contravened any by-law, he may be made to pull down the work erected in contravention thereof—that is all (see by-law 99). By the Public Health Act, 1875, s. 158, where plans are required by the by-laws made by *an urban sanitary authority* to be laid before that authority, "the urban authority shall, within one month after the same has been delivered, signify in writing their approval or disapproval; . . . . and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down" at the expense of the offender. No provision is made in the Act or in any subsequent Act for the case of plans required by the by-laws of a rural sanitary authority to be deposited. Nothing can be more unsatisfactory than the phraseology used, and legislation which requires that which is sometimes called a *benevolent*, but what is really a slovenly, interpretation, is greatly to be deprecated. But one is bound, I suppose, to attribute some intention to legislation of this kind, and it can hardly have been meant to leave out in the cold the cases in which in the year 1875 deposit of plans had been required by by-laws of rural authorities invested under the Act

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of 1872 with urban powers. There must have been such cases—probably many of them; and I suppose, therefore, I am justified in saying that for the purposes of s. 158 a rural authority so invested is an urban authority, and in that fashion holding that s. 158 applies to the present case. If so, and if, as appears to be admitted by the defendants in this case, the applicant has contravened no by-law, I see no reason why he should not proceed to build. If he contravenes no by-law in the course of his building, nothing can be done to him that I can see. Indeed, s. 158 appears to be framed on the supposition that no consequence will follow from building without waiting for approval or disapproval, without approval or even in spite of disapproval, if no by-law be contravened. It is true that the section deals in terms only with the power to pull down without an order; but the limitation on that power would be of no value whatever if an order for demolition could be obtained, though no by-law or other enactment were contravened, and the section is a very clear intimation of the view of the Legislature. I do not suppose in face of the provisions of this section the Local Government Board would sanction a by-law which made the mere building without approval, or even in spite of disapproval, an offence. Such a by-law would in my opinion be, to say the very least, of questionable validity in face of s. 158. The whole train of reasoning in the judgment in *Reg.* v. *Corporation of Newcastle-upon-Tyne* (1) strongly supports this view. At all events, in the present case there is no such by-law, and nothing, so far as I can see, to hinder the applicant from building in spite of disapproval so long as nothing contrary to any enactment is done. In *Reg.* v. *Preston* (2) and *Reg.* v. *Newcastle-upon-Tyne* (1), just cited, it seems to have been assumed that serious consequences would follow from building without approval of the plans. Sect. 158, however, appears to me to have been framed with a careful regard to the rights of property. It contains provisions of great value, as it ensures that the local authority shall have notice of what is going on or likely to be done, and when by-laws have been made providing, as they often do, that the building may be pulled down if not

(1) 60 L. T. (N.S.) 963.

(2) 3 Times L. R. 665.

in conformity with the deposited and approved plans—which is quite consistent with s. 158—a most important security against objectionable structures is attained. Still it is a matter of risk for the owner to go on building without approval, and approval ought not to be withheld upon untenable grounds. In the two cases just cited, the objections taken by the local authority were, in the one case, that the proposed building would interfere with a projected street, and in the other that the sort of building proposed was not in keeping with a residential neighbourhood. In each case the Court granted a mandamus to approve the plans. In the present case the only objection taken is scarcely more tenable. It is that the plans cannot be approved until the applicant has made provisions at his own expense for sewers in the proposed streets, and for an outfall sewer. This is to impose upon him a burden which, to the extent to which such works may be necessary, falls by law upon the local authority, whether rural or urban (s. 15 of the Act of 1875); and certainly no encouragement ought to be given to put the screw upon the applicant in order to free the respondents at his expense from the performance of a duty cast by law upon them. If there is no other objection, certainly approval ought not to be withheld upon this ground. The defendants by their counsel object that to approve the plans may commit them irrevocably to very expensive works, which it seems are not needed for the rest of the district, but are really wanted for the improvement of the applicant's property, part of which he is proposing to turn into a building estate. They say, and in this are right, that there is nothing in the mere approval by them of plans shewing a large group of streets and buildings to compel the applicant to build the whole or any substantial part of the proposed houses, and that although the applicant here is Lord Hastings, and presumably rich enough to support the large outlay contemplated, he might be a speculative builder without any means other than the general resource of the speculative builder—money expected to be borrowed, but very often indeed failing to be raised; that it will be time enough to consider how the drainage is to be dealt with when there is some indication that the scheme will really be carried out; and that by approving the

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plans they will be committing themselves prematurely to the construction of a definite set of expensive works. These considerations are not without weight. The by-law requires that the plans shall shew the intended size, depth, and inclination of each drain; and if they do so, which in the present case I doubt, though no such objection has been taken, and the plans are approved, the local authority must make the street sewers so as to accommodate the accepted drains, and the outfall so as to accommodate the street sewers. It would be impossible to sanction depths and levels for drains which fix those of the street sewers without careful consideration of the possible and probable future needs of the rest of the neighbourhood; and the burden on a rural community might be intolerable if in the end but a portion of the proposed building scheme should be carried out, after the local authority was practically committed to a system which might have been very different if the original plans had been confined to the houses afterwards in fact erected. The legislation has certainly not directly met such a case. Sects. 21 and 22 of the Act of 1875 contain the only provisions for connecting houses with sewers and cesspools applicable to *rural* authorities, and s. 25 contains further enactments for *urban* districts with which by s. 276 the Local Government Board may by order invest a rural authority; but all these powers together are very imperfect. The local authority, however, is not without protection, and I am inclined to think, in this case, adequate protection. Under s. 277 they can obtain from the Local Government Board an order constituting the area proposed to be built upon, or any proper modification of it, a special drainage area—in which case the whole of the cost of the new drainage will be thrown upon the area. On the other hand, the new area will be then exempt from the drainage rates of the district generally. With this the applicant would be content, and it seems just enough. But the defendants wish to keep the applicant as a contributor in respect of the area in question to the rest of the drainage, and to force him to pay for the discharge of their duties, which is not just or right. The defendants have a further protection, should it be worth their while, when the new streets to be laid are completed, to take them

over: they can compel the applicant or purchasers from him to pay for all the cost of putting the streets into good order to begin with, including the construction of sewers, by getting an order from the Local Government Board under s. 276 giving them urban powers in respect of the new streets. I wish in nothing that I have said to lay down any definite rule as to what matters may be properly taken into consideration by the local authority as grounds for withholding approval of plans. If they contravene by-laws, though such by-laws do not relate to mere details of construction, the ground may, in my opinion, be a good one. If they contravene, and the building when erected would contravene an Act of Parliament, such a ground may very well be perfectly valid; and I am not at all prepared to say that general considerations of a character analogous to some I have been discussing may not be valid grounds for withholding approval altogether or temporarily. Each case must be dealt with upon its own merits, and according to its own circumstances. Seeing, therefore, that the defendants have refused their approval to the plans on the ground that the applicant has not provided for what it will be their duty and not his to provide, and on no other ground, I think the mandamus to approve the plans must be granted.

Rule absolute.

Solicitors for prosecutor: *Flux & Leadbitter, for Leadbitter & Harvey, Newcastle-on-Tyne.*

Solicitors for district council: *Williamson, Hill & Co., for Whitehorn, North Shields.*

J. F. C.

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April 30;
May 1;
June 6.

WESTERN *v.* BAILEY.

Copyhold—Heriot Service.

A right in the lord of a manor to take a heriot as due by heriot service may exist as well in the case of copyhold as in that of freehold tenements of the manor.

TRIAL before Wills J. without a jury.

The plaintiff, Sir Thomas Western, was the lord of the manor of Mundon Hall, in the county of Essex. The defendants were the executors of George Christy, deceased. By an admission dated July 2, 1879, the said George Christy was admitted tenant of certain copyhold tenements of the manors, including, amongst others, two respectively known as Scotts and Langmead. George Christy died seised of the said tenements in December, 1894. At the time of his death he was not possessed of any beasts then being, or which had ever at any time been, within the manor; but he died possessed of two beasts outside the manor, which the defendants, in ignorance that the plaintiff made any claim to them as heriots, sold for the purpose of realizing their testator's estate. The said two beasts were sold for 63*l.* and 53*l.* respectively. The plaintiff claimed that the said two tenements calls Scotts and Langmead were heriotable, and that he was entitled on the death of George Christy in respect of each of such tenements, either by heriot custom or by heriot service, to a heriot of the best beast of the deceased tenant, and brought this action against the defendants for having by the said sale prevented him from exercising his right of seizure.

Bosanquet, Q.C., and *Lyttelton*, for the plaintiff.

Elton, Q.C., and *J. C. Earle*, for the defendants. The plaintiff's claim must be either (1.) by heriot custom, or (2.) as heriot service, or (3.) as suit heriot. First, the heriots cannot here be claimed by custom, and for two reasons: the evidence shews that the alleged custom only purported to attach to certain particular copyholds of the manor, and there was

nothing to connect those particular tenements together as belonging to a class to which a valid custom could apply: *Nicholson* v. *Smith* (1); *Anon.* (2); and a custom to take a heriot can only apply infra manerium, for a custom is essentially local in its nature: Co. Litt. 113 b. In the present case the tenant never had within the manor any beasts to which a custom could attach.

Secondly, the heriots cannot here be claimed as heriot service, for heriot service applies only to freeholds of the manor, and not to copyholds, inasmuch as it depends upon a reservation in a grant of a fee simple made before the Statute of Quia Emptores, and arises from the tenure between the lord and tenant: 1 Scriven on Copyholds, 4th ed. p. 370.

Thirdly, they cannot be claimed as suit heriots. This latter kind of heriot is created by a special contract between the lord and the tenant in modern times, and is in the nature of rent: *Lanyon* v. *Carne.* (3) But the terms of the admittance of the defendants' testator do not shew any reservation of such a heriot by the lord. And, further, it is essential that a suit heriot should be taken within the manor: *Parker* v. *Gage.* (4)

In Bl. Com. vol. ii. p. 424, it is said that a heriot, "being ascertained by the option of the lord becomes vested in him as his property"; but before it is so ascertained it cannot vest in him. In *Abington* v. *Lipscomb* (5), where the plaintiff, being entitled to five best beasts as heriots, marked seven beasts and left them in the possession of the defendant, it was held that, upon the defendant's refusing to deliver them up, trover would not lie for any of them, it not being ascertained that any five were legally chosen: see *Woodland* v. *Mantel.* (6) There must be some connection between the thing claimed and the land in respect of which it is claimed; it must either be on the land at the time of the tenant's death, or at least must have been on the land at some time or other: 14 Vin. Abr. tit. Heriot, 298, pl. 2.

Bosanquet, Q.C., in reply. It must be conceded that the

(1) Lutw. (English ed.) 50.
(2) Dyer, 363 b.
(3) 2 Wms. Saund. 164.
(4) 1 Show. 81.
(5) 1 Q. B. 776.
(6) Plowd. 94.

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claim by heriot custom cannot be supported. But the plaintiff was entitled to these beasts by heriot service. There is no authority that a right to a heriot by heriot service is confined to freehold tenements of the manor. It is equally applicable to copyholds. Indeed, Coke says that "it proceedeth rather from villeins than freemen": Coke's Copyholder, s. 24. The historical origin of the right is that as all the villein's goods belonged to the lord, the latter, in taking a heriot, was, by an act of grace, only taking a part of that of which he was entitled to take the whole. Heriot service is in the nature of rent; it is a personal liability on the part of the tenant, and does not touch the land: Coke's Copyholder, s. 24; 2 Watkins on Copyholds, ch. vi.

The right is to the tenant's best beast wherever it may be, not merely to the tenant's best beast within the manor. If at the time of the tenant's death his beast was not within the manor, the lord might distrain other goods of the tenant to compel him to produce the beast, and such distress could only be exercised within the manor. But he might seize the beast itself anywhere, whether for heriot custom or for heriot service: *Austin* v. *Bennett*. (1) The old forms of plea justifying the taking of a beast as a heriot never averred that the beast had been within the manor. It is not contended that the property in any specific beast vests in the lord immediately on the death of the tenant. This is not an action of trover, but an action on the case in the nature of subtraction for depriving the lord of the opportunity of selecting the beast.

Elton, Q.C., in rejoinder. *Austin* v. *Bennett* (1) is not in point, for the cow in question there had been within the manor; and the case decided nothing more than that the lord had a right to follow and seize off the manor a beast which had been eloigned.

Cur. adv vult.

June 6. WILLS J. This is an action by the lord of the manor of Mundon Hall, in Essex, against the executors of George Christy, a copyholder of the manor, for the value of

(1) 1 Salk. 356.

two beasts which formed part of the estate of the said George Christy, and to which the plaintiff claims to have been entitled as heriots. The statement of claim alleges that the said George Christy was admitted on July 2, 1879, as tenant of certain copyhold tenements known as Bramble Hall Farm, containing 128 acres, to hold for ever at the will of the lord by the tenure of paying or rendering to the lord the several yearly rents of 1*l.* and 1*l.* 4*s.*, two heriots when the same should happen, and other the customs and services therefor due and of right accustomed. In the alternative, the plaintiff claims the same as due by heriot custom in the manor. The statement of claim goes on to allege that George Christy died seised of two heriotable tenements parcels of Bramble Hall Farm, to wit, Scotts and Langmead, and the defendants after the death of George Christy wrongfully sold his best two beasts, to which the plaintiff was entitled as heriots.

It was admitted at the trial before me by Mr. Bosanquet, of counsel for the plaintiff, that the claim by heriot custom could not be sustained. There are only some of the copyhold tenements in respect of which a heriot can be shewn to have been taken or even claimed, and there is between them no definite relation of locality or of any other kind which can be made to link them together as the subjects of a legal custom.

The claim I have to consider, therefore, is one of heriots due by heriot service. The admittance of July 2, 1879, recites the death of George de Horne, a tenant in fee of the tenements therein mentioned, and the devise by him of the said tenements to George Christy, and that on the death of George de Horne two heriots fell to the lord which had been compounded for the sum of 10*l.* 10*s.*, and proceeds to state that the said George Christy, by his attorney, came before the steward and prayed of the lord to be admitted to the premises so devised to him—namely, a messuage called Bramble Hall Farm, with the appurtenances and all the customary lands, meadows, marshes, woods, and hereditaments to the said messuage belonging; and one other messuage, and thirty acres of land, and a marsh customary and heriotable called Scotts; and also another customary marsh called Garlands, held by the yearly rent of

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1*l.* 4*s.*; and also a customary messuage and a parcel of land containing thirty acres heriotable called Lang Mead, otherwise Long Mead, with the appurtenances, held by the yearly rent of 1*l.*; to which the said George Christy by his said attorney, the lord of the manor by his steward, did grant and deliver seisin thereof by the rod, to hold the said premises unto the said George Christy, his heirs and assigns, for ever, according to the will of George de Horne, of the lord of the manor by the rod at the will of the lord, according to the custom of the manor by copy of court roll, the said two rents, two heriots, when the same shall happen, and other the customs and services theretofore due and of right accustomed; and he gave to the lord for a fine on his admission as appears in the margin (where no fine is mentioned), and so was admitted tenant in form aforesaid, and his fealty was respited. There is, therefore, an admission by George Christy, who took by his grant, that both Scotts and Lang Mead were heriotable tenements, and, looking at the documents as a whole, I think the grant may be construed as one, in respect of Scotts, of the tenements to be held (amongst other things) by heriot service, and in a similar way as to Lang Mead. But no such tenure for an estate in fee simple has been capable of being created since the Statute of Quia Emptores; and, therefore, there can be no such tenure established merely by the acquiescence of the grantee in either recital or operative words; and it is necessary, therefore, in spite of the recital and the language of the admission, to see whether the evidence supports the allegations.

A point has been made by Mr. Elton that heriot service, as distinguished from heriot custom, is in itself a badge of a free tenancy, and cannot exist as between the lord of the manor and his copyhold tenant, and there is undoubtedly much that may be urged in support of such a view. In Gilbert on Distress, at p. 8, it is said that wherever there were any footsteps of a distress the heriot was always supposed to be part of the feudal reservation; and he goes on to point out that heriot custom arose originally from the grant of a tenant and not upon reservation on the feudal donation by the lord, language which is certainly more naturally applicable to freeholds than

to copyholds. Scriven in one passage clearly takes this view, because he says, when speaking of certain distinctions (it is not necessary for the present purpose to particularize them): "These distinctions are inapplicable to copyholds, *not only as being confined to heriot service*, but, &c.," the rest of the passage being immaterial: Scriven, 5th ed. p. 257. Blackstone (Com. vol. ii. 423) says heriots "are now for the most part confined to copyhold tenures, and are due by custom only," which is on the same lines. It is a remarkable fact that, although I have examined a great many, certainly twenty or thirty, and I think considerably more, of the cases cited in Brooke's Abridgment, in Comyn's Digest, in Bacon's Abridgment, in the notes to *Lanyon* v. *Carne* (1), and in Watkins and Scriven, comprising all of what I may call the stock cases on heriot service, I have failed to find one from the Year Books downwards in which the seizure of a heriot has been justified on the ground of its being due as heriot service from a copyholder. There are plenty of such pleadings in which the justification has been that the heriot was due as a service to be rendered by a free tenant of the manor, plenty where it has been alleged to be due from a copyholder by the custom of the manor, and some few, of which *Damerell* v. *Protheroe* (2) is a type, where a heriot has been alleged to be due by custom from a free tenant of the manor. But, though I have searched for the purpose, I have not yet come across one in which the heriot has been alleged to be a *service* due from a copyholder. On the other hand, I can find no definite expression of the view that heriot service is in its nature repugnant to copyhold tenure. I think it was not the view of Watkins, and it certainly was not that of his learned editor, Mr. Coventry: see note (1) to p. 103, vol. ii. of the 4th ed. (1825). In Comyn's Digest, tit. Copyholder, the sections which deal with services begin (K 8) by the statement that "a copyholder ought to do his services to the lord"; and then come various services both copyhold and freehold, and then comes K 19, which says that heriots may be due by tenure which is heriot service or by custom, with no intimation

(1) 2 Wms. Saund. 164, and vol. ii. pp. 486–7 of the edition of 1871.
(2) 10 Q. B. 20.

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that heriot service may not be in the nature of a base service such as a copyholder might be liable to. In Bracton, bk. ii. at the end of c. 36, and in Fleta, bk. iii. c. 18, it is said without distinction or qualification that there is a certain "præstatio" or "due" (in the Dictionnaire de Législation Usuelle, by Chabrol Chaméane, Paris, 1833, "prestation" is expressed as a "redevance") called a heriot, which arises where a tenant "liber vel servus in morte suâ respicit dominum suum de quo tenuerit." Bracton died in 1268. Fleta probably lived till after the Statute of Quia Emptores, which was passed in 1290. Both of them go back nearly to the epoch of legal memory, and therefore their testimony is very important on such a matter. In the History of English Law, by Sir F. Pollock and Professor Maitland, there is a very interesting treatise on "Unfree tenure" (vol. i. pp. 337–366), in which those very learned writers give strong reasons for saying that copyhold tenure had not in fact crystallized during the thirteenth century into anything like the present tenure "by copy of court roll at the will of the lord." But in dealing with matters of this kind one always has to remember that what we find crystallized in the uniform practice of later centuries has by a fiction of law to be referred to the origin of legal memory whether the fact be so or not, and in very many cases that presumption prevails, though every one knows that it is in fact untrue. I therefore find myself unable, notwithstanding the considerations I have mentioned, to hold that the fact of the tenements now in question being copyhold is necessarily fatal to the proposition that they were held by heriot service.

[The learned judge then proceeded to examine the evidence, and came to the conclusion that Scotts was not a heriotable tenement, but that as regards Langmead the plaintiff's claim that it was heriotable was made out.]

There has been some discussion as to whether an action will lie for selling the beast to which the lord was entitled as a heriot; but I cannot entertain a doubt that in one form or another he is entitled to maintain an action for its value. The service is said to be a render, and, although of course the dead man who held by the render cannot perform the service, there

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is no reason why his executors should not be bound to it. The lord is also entitled to seize the heriot, and the sale prevented him from exercising his right. It does not matter in these days what precise form the action ought in former times to have taken. There is the right and the interference with it, which is enough. There will, therefore, be judgment for the plaintiff for 63*l*.

Judgment for the plaintiff.

Solicitors for plaintiff: *Western & Sons.*

Solicitors for defendants: *Baileys, Shaw & Gillett.*

J. F. C.

[IN THE COURT OF APPEAL.]

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June 20.

BATES *v.* DONALDSON.

Landlord and Tenant—Lease—Covenant not to assign without Licence—Licence not to be unreasonably withheld—Refusal because Lessor desires Possession.

A lease contained a covenant by the lessee not to assign without licence, "such licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee," and a clause for re-entry on breach of any of the covenants of the lease. The lessor withheld a licence to assign because he desired to obtain possession of the premises. In an action by the lessor to recover possession for breach of the covenant:—

Held, that the licence had been unreasonably withheld, and that the lessor was not entitled to recover.

APPEAL from the judgment of Mathew J. at the trial of the action without a jury.

The action was brought to recover possession of a house on the ground of a breach by the lessee of a covenant contained in the lease in these terms: "The lessee shall not nor will assign or underlet the demised premises for the whole or any part of the term hereby granted without having first obtained a written permission or licence signed by the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee or undertenant." The lease, which was for fourteen years from September 29, 1888, contained power of re-entry for breach of any of the covenants therein.

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The plaintiff bought the interest of the original lessor with the intention of leaving the house to his wife if she survived him.

The lessee subsequently entered into an agreement, specific performance of which was afterwards enforced in a Chancery suit, to assign for the sum of 400*l.* the remainder of the term to the defendant. At the time when this agreement was made the plaintiff had entered into negotiations with the lessee for the surrender of the lease for the sum of 400*l.*, but no agreement had been come to. Application was made to the plaintiff for a licence to assign to the defendant, which was refused. The assignment having been carried out, this action was brought to recover possession from the defendant the assignee.

It was stated at the trial that the plaintiff had always been willing to give 400*l.* for the surrender of the lease.

The learned judge came to the conclusion that no objection could be taken to the defendant as a respectable and responsible person, and that the object of the plaintiff in withholding permission to assign was that he might himself obtain possession of the premises. He held that the withholding of the licence was, under the circumstances, unreasonable, and gave judgment for the defendant.

The plaintiff appealed.

June 11. *Channell, Q.C.*, and *C. A. Russell*, for the plaintiff. The question is whether the withholding of the consent was unreasonable, and whether it was so may depend on other considerations than the question whether the proposed tenant is a respectable and responsible person. This is laid down by Kay L.J. in *Barrow* v. *Isaacs*. (1) It is a reasonable ground for refusing a licence that the landlord desires the premises himself, provided that he is prepared to put the tenant in the same position as if she had obtained a licence and assigned. This view is supported by the case of *Lehmann* v. *McArthur* (2), though the point was not decided, and *Treloar* v. *Bigge* (3), where Kelly C.B. refutes the argument that the refusal of a

(1) [1891] 1 Q. B. 417, at p. 424.
(2) L. R. 3 Ch. 496.
(3) L. R. 9 Ex. 151.

licence to assign must be arbitrary if it does not turn on the character of the proposed assignee. The plaintiff has always been prepared to give the same amount for the lease as the lessee obtained from the defendant; and there are no other circumstances which would make it detrimental to her to surrender to the plaintiff rather than to assign to the defendant. Her position would be exactly the same in each case, and the refusal of a licence under these circumstances was not unreasonable.

Bucknill, Q.C., and *Mulligan*, for the defendant. It is not necessary to contend that there may not be reasonable objections to granting a licence to assign to a responsible tenant, as, for instance, if the use to which the premises are to be put is objectionable; but the objection must be one that arises on the relation of landlord and tenant, which would subsist if the licence is granted. If no such objection arises, the refusal of a licence because the landlord desires himself to occupy the property is unreasonable.

Channell, Q.C., in reply.

1896. June 20. KAY L.J. read the following judgment:— This is an action of ejectment by a landlord to recover possession of No. 14, Cavendish Square, for breach of covenant by the tenant.

The covenant in question, contained in a lease for fourteen years from September 29, 1888, was not to assign "without having first obtained a written permission or licence signed by the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee."

It is plain on the face of that covenant that it is not sufficient that the proposed assignee should be a respectable and responsible person. The words clearly shew that the landlord may nevertheless have some reasonable ground for refusing his consent. I shall not attempt to give any exhaustive definition of what would be in every conceivable case an unreasonable withholding of permission. The only question which it is necessary to consider is whether in the circumstances of this

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case the refusal was reasonable within the meaning of this covenant.

Counsel admitted, and I agree, that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was not forbidden by the lease, nor by any rule of law, the landlord might reasonably refuse to permit the assignment. So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of this covenant.

In this case the plaintiff bought the interest of the original lessor with the intention, he says, of leaving the house to his wife if she survived him, for herself and his grandchildren to live in after his death. With this object he negotiated with the lessee, Mrs. Wilson, to purchase her interest, and his agent obtained Mrs. Wilson's consent to sell her interest for 400*l*. Not having received any further communication from the plaintiff, five days later Mrs. Wilson agreed to sell her lease to the defendant Donaldson. She did not communicate her intention to do this to the plaintiff, and of course she did not obtain his consent. She did not ask for it. She has no reason for preferring Donaldson to the plaintiff. All that she wants is to get rid of the lease and to get 400*l*. for her interest. The plaintiff says that he has always been willing to give her 400*l*., and he admits that he wishes to compel her to sell it to him, and that this is the reason why, when an application was made for his written consent after the contract to sell to Donaldson, he refused to give it.

It is obvious that if the plaintiff had a right to refuse his consent, that right cannot be taken away or affected by anything done by the lessee before she asked for it. Donaldson has obtained a decree for specific performance against her. That cannot alter the rights of the plaintiff in any way. The sole question is—was the plaintiff unreasonable in refusing his consent at the time when he was asked to give it?

As the proposed assignee in this case is a respectable and responsible person, the plaintiff must shew a strong reason for withholding his consent. Clearly it is not sufficient for him to

say, "I want to oblige the lessee to sell to me." He must at least be able to shew that at the time when the consent was refused, if that was his motive, the refusal did no harm to the lessee.

I cannot find that before or at the time when the plaintiff refused his consent he had offered to buy the lessee's interest for 400*l.* or any sum. He does not allege in his pleading that he did so. He does not offer to do so in his pleading.

The plaintiff is, therefore, in the position of asserting simply that he is entitled to eject the defendants because they have not got his written permission.

That is not the contract. The lessee had a right to assign without his permission if he withheld it unreasonably. Was it reasonable to refuse without making any offer to buy for himself? If he had answered the request for permission by saying, "I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you," the case might have been different, but that, at least, he ought to have done. He did nothing of the kind. On the contrary, his excuse for refusing permission was that he believed the purchaser intended to carry on at the house his business of a picture dealer, and it was only when this failed that the plaintiff set up the plea on which he now relies.

On the whole, I am of opinion that the refusal was, under the circumstances, unreasonable, and that this appeal should be dismissed.

A. L. SMITH L.J. read the following judgment. This is an action of ejectment, and the question is, what is the meaning of the phrase that permission to assign shall not be "unreasonably withheld" in a clause in a lease?

In the year 1889 the plaintiff purchased the reversion of a house expectant upon the determination of a lease theretofore granted to Mrs. Wilson, which expires in 1902.

In the year 1895 the plaintiff became desirous of obtaining possession of these premises, and, through an agent, negotiated with Mrs. Wilson for the surrender by her to him of her lease.

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Mrs. Wilson asked 400*l.* for her unexpired term. The agent was not authorized to accept this offer, and some days elapsed before he obtained authority from the plaintiff to agree to pay this amount to Mrs. Wilson. In the meantime she, having no contract with the plaintiff that he would give what she asked, on February 7, 1895, entered into a contract with the defendant to assign to him the residue of her term for 400*l.* The plaintiff, as it turns out, would have given Mrs. Wilson the 400*l.* which she asked; but when she contracted with the defendant she did not know this.

It is now admitted that the defendant is in every way a respectable and responsible person, and that no objection can be made to him personally, nor is it suggested that he is about to use the house in any improper or undesirable manner.

On February 11, 1895, application was made to the plaintiff for his licence to assign to the defendant, and the plaintiff took exception to the defendant as an assignee, and ultimately declined to give his assent. It must now, however, be taken that the sole reason he had for refusing his assent was because he wanted possession of the house himself; and he now seeks to eject the defendant, who has entered into possession of the house, upon the ground that the following covenant in the lease to Mrs. Wilson has not been complied with by her. It is this: "That the lessee shall not nor will assign or underlet the demised premises for the whole or any part of the term hereby granted without having first obtained a written permission or licence signed by the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee or undertenant." There is in the lease a power to re-enter in case of breach of any of the covenants therein.

It will be seen that it is only when a respectable and responsible person is proposed as assignee or undertenant that this clause (as to the permission not being unreasonably withheld) comes into play. If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission; if, however, the person proposed be respect-

able and responsible, then the lessor cannot unreasonably withhold his permission.

This stipulation as to the permission not being unreasonably withheld (if a respectable and responsible person is obtained) releases the lessee from the covenant not to assign without permission, if the permission is unreasonably withheld, and this was so held in *Treloar* v. *Bigge* (1).

Now, what is an unreasonable withholding of permission within the meaning of this clause?

It is conceded by counsel for the plaintiff that if a tenant was desirous of assigning to a friend, it would be unreasonable for the lessor to withhold his assent for the purpose of breaking the lease; but it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted, and as much as he could get from a stranger, it was not unreasonable to withhold his assent in order, if possible, to break the lease, if he wanted the premises for himself. This is not my reading of the clause.

It is admitted that there is no case in the books which covers the present.

Now, when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable and responsible assignee—in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld.

For these reasons I think that Mathew J. came to a right conclusion, and that this appeal must be dismissed with costs.

(1) L. R. 9 Ex. 151.

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The Master of the Rolls agrees with the result of these judgments.

Appeal dismissed.

Solicitors for plaintiff: *Witham & Co.*

Solicitors for defendant: *Norris & Norris.*

A. M.

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[IN THE COURT OF APPEAL.]

PUGH *v.* THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Insurance—Accident—Policy covering Accident sustained in discharge of Insured's Duty—Nervous Shock arising from Fright—Right to Recover under Policy.

The plaintiff was a signalman in the employment of the defendants, a railway company, who entered into a contract of insurance with him, by which they agreed to pay a weekly allowance in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service, such insurance to be absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty. The plaintiff in the discharge of his duty endeavoured to prevent an accident to a train by signalling to the driver, and the excitement and fright arising from the danger to the train produced a nervous shock which incapacitated him from employment. In an action to recover from the defendants the weekly allowance:—

Held, that the plaintiff had been incapacitated by accident within the meaning of the policy.

APPLICATION on behalf of the defendants to enter judgment for them or for a new trial in an action tried before Cave J. with a jury.

The plaintiff was in the employment of the defendants, a railway company, who entered into a contract of insurance with him by which they agreed, "subject to the terms and conditions printed on the back hereof, to pay his representative or representatives the sum of two hundred pounds in case of his death from accident occurring in the discharge of his duty in the company's service, and to pay the insured the weekly allowance specified on the back hereof as the weekly allowance payable in respect of a first-class policy, in case of his being

incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service." By the schedule of terms and conditions the temporary weekly allowance, in the case of a first-class policy, was 20*s*., which the insured was entitled to receive during his disablement for not longer than fifty-two weeks altogether, and the insurance was to be "absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty."

The plaintiff was employed as a signalman, and while in the discharge of his duty he saw, from the signal-box, a train approaching on the line, and noticed that from the condition of one of the carriages an accident was imminent unless the train were stopped. He took steps to do this by leaning out of the signal-box and waving a red flag to attract the attention of the engine-driver. The train was stopped, and no accident occurred to it. The plaintiff did not come in any way into contact with the train; but the excitement and the alarm caused by the anticipation of the accident which appeared to be imminent, and the necessity for taking immediate action to prevent it, caused a shock to his nervous system which affected him to such an extent that he became incapacitated from employment, and continued so for more than fifty-two weeks from the date of the occurrence. The defendants paid to the plaintiff a weekly allowance for some time; but they disputed their liability under the policy, and the plaintiff brought this action to recover the balance of 52*l*., the total allowance for fifty-two weeks. The case was tried before Cave J. and a jury, who found, in answer to a question left by the learned judge, that the defendant was incapacitated from employment by reason of an accident sustained in discharge of his duty in the company's service, and found a verdict in his favour, on which judgment was entered.

The defendants appealed, on the grounds that there was no evidence to go to the jury, and no question which should have been left to them, and also on the ground that the verdict was against the weight of the evidence.

Bucknill, Q.C., and *Hammond Chambers*, for the defendants. There was no evidence to go to the jury that there had been

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any accident within the meaning of the policy, and no question should have been left to them. Witnessing an accident is not in itself an accident to the person who does so. There must be some direct physical connection between cause and effect. If the effect is produced by impact or concussion, as, for instance, if a man were rendered deaf by the noise of an explosion, there would be an accident; but when the effect produced is only due to fright or nervousness there is no accident within the meaning of the policy, because this is due to the mental state of the sufferer and not to external causes. This is illustrated by the case of *Victorian Railways Commissioners* v. *Coultas* (1), where it was held, in an action for damages arising from the defendants' negligence, that damages for a nervous shock or mental injury caused by fright at the impending collision could not be recovered.

Spencer Bower, for the plaintiff, was stopped.

Hammond Chambers, in reply.

LORD ESHER M.R. I think the learned judge was right in pointing out that the liability of the defendants did not depend on negligence, but on whether, on the true construction of this contract, the defendants are liable. It therefore becomes unnecessary in this case to consider whether we ought to act upon or according to the case of *Victorian Railways Commissioners* v. *Coultas* (1) in the Privy Council, as that was an action for negligence. That case is different, and I should not like to express an opinion as to whether we ought to follow it until I am forced to do so.

In this case the plaintiff was in the employment of the railway company, and by virtue of his employment he was bound to perform certain duties. One part of his duty was by signalling or working the points to prevent accidents, either by a train or to a train. He was at the place appointed to him in which he had to perform those duties, and he saw a train approaching at full speed, and the condition of one of the carriages shewed him that the train was not in its ordinary condition, but that there was something wrong, and that the

(1) 13 App. Cas. 222.

train was in danger. He was called on to act with regard to the impending danger, and he took a reasonable and proper course in trying to stop the train and prevent an accident. He had a very great responsibility put suddenly upon him, and it was natural that this should be accompanied by great excitement. The immediate result was a shock to his nerves which, it was admitted, lasted up to the time of the trial, and incapacitated him from employment.

The question is whether this state of things comes within the terms of the policy. He was incapacitated from employment by reason of a shock which operated physically to prevent him from doing his work. That physical disease was caused by the excitement and fright which arose in consequence of the immediate and serious responsibility which was thrown upon him. The fright which he underwent seems to me to be the accident which happened in this case, and that accident happening in the course of his employment affected his nerves and incapacitated him. It seems to me that the case is brought directly within the terms of the policy, and that the learned judge was right in taking that view. There was no misdirection, and certainly it was not a case in which the plaintiff ought to have been non-suited. I think therefore that this appeal must be dismissed.

KAY L.J. The defendant company enter into contracts of insurance with their employees, of which the document before us is an example. The action is brought by one of their former employees upon this contract of insurance, which provides that they shall pay his representatives 200*l.* in case of his death from accident occurring in the discharge of his duty in the company's service, or shall pay him in the case of a first-class policy the weekly allowance specified on the back, in case of his being incapacitated for employment by reason of accident sustained in the discharge of his duty in the company's service. On the back one of the conditions referred to, and embodied by reference in the policy, contains these words: "The insurance is absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty." It

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cannot be denied that what happened to the plaintiff occurred in the discharge of his duty. He was in the signal-box, and had under his charge the signals on either side, and the points, and was provided with a red flag with which to indicate to a coming train that there was danger. He had to determine what he should do to prevent the accident which was imminent, and he did that which was, I have no doubt, the best thing to do, namely, leaning from the window of his signal-box, and waving the flag so that the driver might stop the train. Therefore what he did was in the actual discharge of an imperative duty, which required him to do the best he could to prevent the impending disaster. When he had done this he was overcome by the excitement and terror which he had undergone, and from that time until the time of the trial he was, in the words of the policy, "incapacitated from employment." This incapacity happened to him while in the discharge of his duty in the company's service, and the only question that could be argued was whether it was or was not incapacity "by reason of accident," or, to take the words on the back of the policy, whether there was "an accident, however caused, occurring to the insured in the fair and ordinary discharge of his duty."

It is admitted that if the train had struck him, or if by an explosion of the engine, or anything of that kind, an impact of air had been occasioned which had affected him so as to produce a physical injury, although the train itself did not touch him, that would be within the terms of the policy. But it is said the present case is not within the policy, because all that the plaintiff suffered from was a shock to the nerves, occasioned by the excitement and the responsibility which was thrown upon him. I confess I am unable to follow this argument. It seems to me as clearly an accident as if he had been thrown down by the passing train, and to be clearly within the terms of this policy. I therefore think that the view which the learned judge and the jury took of this policy was correct, and that this application for a new trial entirely fails.

A. L. SMITH L.J. This is an action brought upon a policy of insurance by an assured against an insurer. The facts are

not in dispute. The sole question is whether the facts which have been proved constitute an injury to the assured by an "accident" within the meaning of the policy.

The facts have been stated, and I will not recapitulate them. The injury in this case to the assured, to state it in the shortest possible terms, was occasioned by terror and excitement which he underwent when in the exercise of his duty and calling as signalman, in endeavouring to avert disaster to a passing train. The result of that upon him has been such a shock to his nervous system that he has been physically prostrated for months, and unable to follow his avocation.

Then comes the question, upon these facts has this assured suffered loss by an accident within the meaning of this policy? The more I consider this policy the more satisfied I am that the assured is covered by it. The company undertake by the policy to pay to the representative of the assured the sum of 200*l.* in case of his death. But then there is a limitation that the death must be "from accident occurring in the discharge of his duty in the company's service." Supposing this man had been killed by the fright that he had, would he have died of accident arising to him, or what would he have died of? In such a case he would have died of something unforeseen—something which affected him which he could not have looked forward to in any way. It seems to me that the true reading of this part of the policy is that the insurers are to pay the sum of 200*l.* in case of the death of the assured from any unforeseen occurrence to him, however caused, and occurring to him in the discharge of his duty in the company's service. I cannot doubt that this would be covered by the policy. He did not die, so that we must look at the second branch of the clause in the policy. This is not a case in which, as it has been suggested, the plaintiff has only suffered mental pain or grief. If that had been so it would not have been within this policy; but this is a case in which he has been subjected to such a shock to his nerves that he has become physically prostrated, and put out of employment for months. The company has undertaken to pay to the assured the weekly allowance of 1*l.* in case of his being incapacitated for employment by reason of

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an accident however caused. That I read to mean any unforeseen circumstance, however caused, occurring to him in the discharge of his duty in the company's service. I cannot read this policy otherwise than as covering this loss which the plaintiff has sustained. In my opinion he has met with an accident within the meaning of the policy. It may be that this sort of accident was not thought of when the policy was framed, for it is of rare occurrence, but that does not prevent its coming within the terms of the policy. I think the view taken by my brother Cave was right, and that there is no ground for granting a new trial.

Appeal dismissed.

Solicitor for plaintiff: *Henry Keeble.*
Solicitors for defendants: *Rose & Co.*

A. M.

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March 28, 30; *May* 16, 19; *June* 20.

WILMOT *v.* ALTON AND ANOTHER.

Bankruptcy—Bailment of Chattels for Hire—Equitable Assignment by Bailor of Future Payments under Hiring—Bankruptcy of Bailor—Validity of Assignment as against Trustee.

A trader, having let out goods on hire under a contract for a fixed weekly sum, assigned her right to receive payments under the contract to a third person as security for an advance. Before any moneys were payable by the hirer under the contract the trader became bankrupt:—

Held, that the assignment gave no title as against the trustees in bankruptcy to any money which might become due after the commencement of the bankruptcy.

TRIAL of interpleader issue before Lord Russell of Killowen C.J., without a jury.

Previously to June 10, 1895, one Ellen Ruthven, a theatrical costumier (trading as Mrs. May), entered into a contract with the Blackpool Winter Gardens and Pavilion Company for the supply of dresses and wigs for a ballet. The terms of the contract were admitted to be correctly stated in a letter dated June 10, addressed to Mrs. May, by the manager of the company, and which was as follows: "Mrs. May, I beg to acknowledge receipt of your contract to supply designs for the

forthcoming ballet, viz.: 'Eldorado, The Land of Gold,' and 'Sons of the Sea,' according to sketch. The terms to be 40*l.* per week for 12 weeks commencing July 8, 1895, and wigs as may be required for the sum of 3*l.* per week for the same period. You to find all materials and to keep in repair during the run. W. Holland (Manager)." The dresses were duly supplied by Mrs. May under the contract.

On July 4, 1895, by an indenture made between Mrs. May, therein called the mortgagor, and Charles Wilmot, therein called the mortgagee, reciting the above contract with the Blackpool Winter Gardens Company, and reciting that the mortgagee had at the request of the mortgagor, and for her accommodation, accepted certain bills of exchange drawn by her to the amount of 330*l.*, it was witnessed that the mortgagor "Doth hereby charge to and in favour of the mortgagee all that her beneficial right title and interest in the said recited agreement . . . for securing to the mortgagee the said sum of 330*l.* . . . And the mortgagor doth hereby constitute nominate and appoint the mortgagee as her lawful attorney for her and in her name to sue and take such legal or other steps as may be necessary to enforce the rights of her the mortgagor under the said recited agreement as if she were personally doing the same." On July 13 a receiving order was made against Mrs. May on her own petition, and on July 23 notice of the receiving order was given by the official receiver to the Blackpool company. On July 26 Mrs. May was adjudicated bankrupt. On August 6 notice of the indenture of July 4 was for the first time given to the Blackpool company. On October 1 a sum of 318*l.* 18*s.* having become due and payable by the Blackpool company under their contract in respect of the hire of the dresses, Charles Wilmot, claiming to be entitled thereto under the assignment to him of July 4, brought an action against the company to recover that sum. The trustees in Mrs. May's bankruptcy having also claimed the money, the company paid the money into court, and an interpleader issue was directed, in which the claimant Wilmot was plaintiff and the trustees were defendants. There was no evidence that any repairs to the dresses became necessary during the run, but if

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any such repairs were in fact done, there was no evidence who did them.

Cooper Willis, Q.C., and *Hawtin*, for the plaintiff. The indenture of July 4 was a valid equitable assignment to the plaintiff of the moneys thereafter to become payable under the contract with the company, and was available as against the trustees. The right of the assignor to receive those moneys was a chose in action, and as such assignable. The bankruptcy law, in dealing with the subject of assignment of choses in action, draws a distinction between choses in action which are debts and choses in action other than debts. An assignment of the former is not good as against the trustee unless perfected by notice to the debtor before the commencement of the bankruptcy; for in the absence of such notice they remain in the reputed ownership of the bankrupt, and consequently become vested in the trustee under s. 44, sub-s. (iii.), of the Bankruptcy Act. But an assignment of the latter is good without any notice to the party against whom the cause of action exists. If, then, the sums thereafter to become payable under the contract with the Blackpool company were debts at the date of the assignment to the plaintiff, the assignment would admittedly be bad, for no notice was given to the company till August 6, and in the interval the assignee had become bankrupt on July 13. But the sums so assigned were not "debts due or growing due" within the meaning of s. 44, sub-s. (iii.). To bring a case within that section there must be a debt—that is to say, either a sum presently due or one which must become due at a future date. The section has never been held to apply to a contingent liability which may never ripen into a debt. *Ex parte Kemp, In re Fastnedge.* (1) Here the payment was only contingent. If the dresses had been accidentally destroyed by fire, the money would never have become payable. In *In re Davis, Ex parte Rawlins* (2), an assignment of future payments under a hiring agreement was held good as against the trustee in bankruptcy in respect of instalments accruing due after the commencement of the bankruptcy. The plaintiff,

(1) L. R. 9 Ch. 383. (2) 22 Q. B. D. 193.

by virtue of the assignment to him, became a secured creditor within the definition of that term in s. 168. In *Ex parte Nichols, In re Jones* (1), where the debtors, who were lessees of the Alexandra Palace, assigned the future receipts to arise from the admission of visitors to the palace, it was held that, as regarded receipts accruing after the commencement of their bankruptcy, the assignment was bad as against the trustee. But that case is distinguishable from the present upon the ground upon which Lord Esher distinguished it in *In re Davis, Ex parte Rawlins* (2), that "the payments accruing after the bankruptcy could not arise by reason of anything existing at the date of the bankruptcy," but arose simply because the trustee chose to carry on the business. There the trustee was in possession of the palace, and might have put an end to the receipts at once. Whereas here the trustees had no possession of the dresses, and could not have put an end to the contract with the Blackpool company, or have prevented the moneys payable under that contract from becoming due. Here the payments did arise "by reason of something existing at the date of the bankruptcy"—namely, the delivery of the dresses.

Bigham, Q.C., H. Reed, Q.C., and *Scarlett*, for the defendants. The case is covered by *Ex parte Nichols*. (1) The moneys assigned to the plaintiff were the future earnings of the assignor's business. The true construction of the agreement between Mrs. May and the Blackpool company is not that she was to supply particular dresses, and, having supplied them, was to lose control over them till after the termination of the run, but that she was to dress the piece, and to be at liberty to substitute other dresses for those first delivered as she thought proper. In so doing she would be simply carrying on her business. But if this view is wrong, and if the delivery of the dresses to the company was a bailment of those specific dresses, the trustees' title must equally prevail, for then the payments arising out of that bailment would be debts; and, no notice having been given to the company before the commencement of the bankruptcy, they would have been in the order or

(1) 22 Ch. D. 782. (2) 22 Q. B. D. 193.

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disposition of the bankrupt, and as such would have been property divisible amongst the creditors.

LORD RUSSELL of KILLOWEN C.J. The question in this case is as to which of the two parties to the interpleader issue is entitled to a sum of 318*l.* 18*s.* which has been paid into court by the Blackpool Winter Gardens and Pavilion Company under the following circumstances. The debtor, Ellen Ruthven, who, under the name of Mrs. May, carried on the business of a theatrical costumier, shortly before June 10, 1895, entered into a contract with the above-mentioned company to supply for hire and to keep in repair during the period of the hiring certain dresses and wigs. The terms of the contract were admitted to be correctly set out in a letter dated June 10, and addressed by the manager of the company to Mrs. May, which letter was in the following terms: "I beg to acknowledge receipt of your contract to supply designs for the forthcoming ballet. . . . The terms to be 40*l.* per week for twelve weeks commencing July 8, 1895, and wigs as may be required for the sum of 3*l.* per week for the same period. You to find all materials and to keep in repair during the run." The dresses were duly supplied by Mrs. May under that contract. On July 4, 1895, by an indenture made between Mrs. May and Charles Wilmot (the plaintiff in this issue), reciting the contract between her and the Blackpool company, and that Wilmot had accepted for her bills of exchange to the amount of 330*l.*, she charged all her beneficial right, title, and interest in the recited agreement for securing to Wilmot the said sum of 330*l.*, and constituted him her attorney to enforce for her and in her name her rights under the recited agreement. Under that indenture she did not purport to assign the goods which were the subject-matter of the contract of bailment to the Blackpool company, nor did she purport to assign the contract itself. All she did was to charge in favour of the plaintiff the moneys receivable by her under the contract as from time to time they should become payable. It is clear such moneys were not "debts," and if they had been the plaintiff's title has not, it is admitted, been perfected by notice. On July 13 Mrs. May presented a petition in bankruptcy, and on that

petition a receiving order was made against her, and on July 26 she was adjudicated a bankrupt. Therefore, any property of hers which she had not validly assigned to other persons before July 13 became vested in her trustees for division amongst her creditors. Subsequently to July 13 there became due from the Blackpool company in respect of the hire of the dresses a sum of 318*l.* 18*s.*; and, that money being claimed both by the plaintiff and by the trustees in bankruptcy, the company paid it into court to abide the result of an interpleader issue. Then the question arises whether the debtor had prior to the bankruptcy made a valid assignment to the plaintiff of the money so becoming payable after the bankruptcy had commenced. I am of opinion that she had not. As I have said, all that she had done was to give the plaintiff a right to use her name to enforce the payment of moneys which she would be entitled to receive under the contract with the company. But her right to receive moneys under that contract lasted only so long as she was not a bankrupt. The moment she became a bankrupt she ceased to have any rights under the contract to enforce. The contract ceased to be hers, and, together with the right to receive moneys under it, became vested in the trustees. There was consequently no right of hers upon which the indenture of charge could operate at the time when it was sought to make that charge effective. The moneys in question represent the earnings arising from the hire of goods subsequently to July 13, at which date the goods, and the contract relating to them, by relation back of the trustees' title, became the property of the trustees.

The question here is, I think, governed by the principle of *Ex parte Nichols, In re Jones.* (1) No doubt there is this difference in the circumstances of the two cases. In *Ex parte Nichols* (1) the trustee might at any time have put an end to the business out of which the earnings arose. Here he could not determine the bailment. The bailees were entitled to the possession and use of the property during the period contemplated by the contract of bailment. But that difference is in my judgment immaterial. The money was payable in respect of the hiring of goods after they had ceased to be the bankrupt's

(1) 22 Ch. D. 782.

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property, and she could only validly charge the moneys (not being debts) which so became due so long as she had a right to receive them. There must be judgment for the defendants.

Judgment for the defendants.

Solicitor for plaintiff: *H. Reid.*
Solicitor for defendants: *J. C. Button.*

J. F. C.

1896

May 2;
June 2.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ERDHEIM.

Criminal Law—Evidence—Admissibility—Public Examination of Bankrupt—Parol Evidence of Bankrupt's Admissions—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 17, *sub-s.* 8.

By s. 17, sub-s. 8, of the Bankruptcy Act, 1883, on the public examination of a debtor he "shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him":—

Held, that sub-s. 8 did not exclude any other mode of proving the debtor's admissions made at his public examination; so that, on the trial of an indictment against a bankrupt for misdemeanours under the Debtors Act, 1869, where notes of his public examination had been taken but not read over by or to or signed by him, parol evidence of the person who took the notes was admissible to prove such admissions.

CASE stated by the deputy recorder of the borough of Leeds for the opinion of the Court for the Consideration of Crown Cases Reserved.

The defendant was tried before the deputy recorder in January, 1896, upon an indictment containing counts charging him with having committed certain misdemeanours under s. 11 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), namely, not discovering part of his property to the trustee in his bankruptcy; fraudulently removing goods to the value of 10*l.* within four months before the presentation of a bankruptcy petition against him; making material omissions from documents relating to his

affairs, and attempting to account for his property by fictitious expenses.

The following material facts were stated in the case:—

In May, 1895, a petition in bankruptcy was filed against the defendant in the Leeds County Court; a receiving order was duly made thereon, and he was adjudged bankrupt. The public examination of the defendant was held before the county court under s. 17 of the Bankruptcy Act, 1883, and having been continued, by adjournment, on five different days, was on the last of those days adjourned sine die. A shorthand writer was appointed by the Court, under s. 17, sub-s. 8, and rule 67 of the Bankruptcy Rules, 1886, to take down in shorthand the evidence of the defendant at the public examination, and to make transcripts of the questions and answers put to and given by him, and those transcripts were to be the notes of the examination under s. 17. The shorthand writer accordingly on each of the five days of the public examination took down in shorthand the evidence of the defendant, and made transcripts of the questions put to and the answers given by him. None of those transcripts were read over by or to or signed by the defendant. At the trial, amongst other evidence for the prosecution, the shorthand writer was called as a witness, and proved formally the matters above stated. As the notes of the public examination could not be used in evidence against the defendant, counsel for the Crown proposed to give parol proof of admissions, made by the defendant in the course of such examination, of facts tending to establish the charges contained in the indictment, and for that purpose tendered the further evidence of the shorthand writer in order that he might prove those admissions verbally. Counsel for the defendant took the objection that such evidence was not admissible on the grounds that, the public examination having been adjourned sine die, the defendant might not have had an opportunity of making a complete statement and explanation with regard to everything charged against him, and that, the notes of the examination not having been read over by or to or signed by the defendant so as to comply with the provisions of s. 17, no other evidence of admissions made by him at the examination could be given.

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The deputy recorder admitted the evidence and left the case to the jury, who found a verdict of guilty against the defendant on all the counts of the indictment.

In the case the deputy recorder stated, with respect to the first objection taken by the defendant's counsel: "I find as a fact that no incomplete statement was given in evidence before me."

The question reserved for the opinion of the Court was whether the further evidence of the shorthand writer was legally admissible at the trial.

C. Mellor, for the defendant. The further evidence of the shorthand writer ought not to have been admitted. The public examination, having been adjourned sine die, was incomplete, and the defendant, the notes of his evidence not having been read over to or by or signed by him, was not given an opportunity of making a complete statement or explanation.

Secondly, the parol evidence of the shorthand writer was not admissible. Sect. 17 of the Bankruptcy Act, 1883 (1) provides

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17:—

"(1.) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

"(2.) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

"(3.) The Court may adjourn the examination from time to time.

"(4.) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

"(5.) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorized by the Board of Trade, may employ a solicitor with or without counsel.

"(6.) If a trustee is appointed before the conclusion of the examination he may take part therein.

"(7.) The Court may put such questions to the debtor as it may think expedient.

"(8.) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

"(9.) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall,

a statutory mode of proving the debtor's statements made on his public examination which is intended to exclude any other mode of proof. He is compelled to answer the questions put to him, and the object of the Act was to give him protection by providing that the notes of his evidence should be read over to and signed by him. Unless the provisions of the Act are complied with strictly the rule "Nemo tenetur se ipsum accusare" applies. The power to examine debtors given by s. 17 is wider than that given in s. 117 (repealed) of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106); because under the later Act the Court may examine the debtor as to his "conduct" as well as his dealings and property. By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 2, sub-s. 1, "the notes taken of a debtor's public examination in pursuance of s. 17 of the principal Act shall be read over either to or by the debtor." By s. 85 of the Larceny Act, 1861 (24 & 25 Vict c. 96), no person shall be liable to be convicted of any of the misdemeanours mentioned in the preceding ten sections by any evidence whatever in respect of any act done by him if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency. That enactment is repealed by s. 27, sub-s. 1, of the Bankruptcy Act, 1890; but sub-s. 2 provides that "a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said s. 85." The whole of this legislation points to the intention of the framers of it that, unless the mode of proof expressly provided by statute be adopted, evidence of the bankrupt's statements or admissions made under compulsion on his public examination is not admissible on a criminal charge against him. In *Reg.* v. *Scott* (1) the examination of the bankrupt was reduced into writing and signed and subscribed by the bankrupt as provided by s. 117 of the Act

by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors."

(1) 25 L. J. (M.C.) 128; 1 Dears. & B. C. C. 47.

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of 1849. The argument made by counsel for the defendant in that case is good in this; and Lord Campbell C.J. (1) states the rule which ought to be applied here—namely, that "the confession of a crime, to be admissible against the party confessing, must be voluntary." If the statutory requirement as to the mode of proof need not be complied with, the evidence of any person who happened to be present at the public examination would be admissible to prove admissions by the debtor.

Sir R. B. Finlay, S.-G. (*G. J. Banks* and *A. W. Bairstow* with him), for the Crown. The only point reserved by the deputy recorder is whether the evidence objected to was admissible. The first objection taken for the defendant only goes to the effect which the jury ought to give to the evidence when admitted. It is submitted that the evidence was admissible. The principle "Nemo tenetur se ipsum accusare" has always been held to be subject to qualification with respect to the jurisdiction in bankruptcy; the bankrupt cannot refuse to answer questions relating to his trade, dealings, or estate though his answers may tend to shew that he has committed a criminal offence: *Ex parte Cossens, Re Worrall* (2), per Lord Eldon (3); *Reg.* v. *Scott.* (4) In the latter case it was pointed out that the privilege of the rule that no one shall be bound to criminate himself had been taken away by force of s. 117 of the Bankruptcy Act, 1849. In the present case it is taken away by the express terms of the Act of 1883. Sect. 17, sub-s. 8, of that Act merely contains a direction as to convenience of proof; it is not intended to exclude any other legal mode of proving statements or admissions made by the debtor in answer to questions put to him at his public examination. If the notes of his examination be read over to and signed by him, they may be put in as substantive evidence; but, if not, his statements or admissions may be proved by the evidence of any one who was present at the public examination and heard them, and the only objection that can be taken is to the weight of the evidence—not to its admissibility. Statements made

(1) 25 L. J. (M.C.) 128, at p. 132.
(2) Buck, 531.
(3) Buck, 531, at p. 540.
(4) 25 L. J. (M.C.) 128; 1 Dears. & B. C. C. 47.

before the Privy Council, or before an examining magistrate, have so been admitted in evidence against an accused person: *Rex* v. *Layer* (1); *Rex* v. *Lambe*. (2) Sect. 27 of the Bankruptcy Act, 1890, is really against the contention for the defendant, because it shews that an express enactment was thought necessary in order to prevent the debtor's statements at his public examination being admissible in evidence against him on an indictment for misdemeanours under the Larceny Act of 1861. [He also referred to *Reg.* v. *Skeen*. (3)]

C. Mellor replied.

Cur. adv. vult.

June 2. The following judgment was read by

LORD RUSSELL of KILLOWEN C.J. The defendant was charged with certain misdemeanours under the Debtors Act, 1869. On May 20, 1895, he had been duly adjudicated bankrupt, and under the Bankruptcy Act, 1883, s. 17, he had been duly examined on oath on five different days, and on the last of those days, namely, November 19, 1895, the examination was adjourned sine die. During his examination a shorthand writer had taken down in shorthand the evidence of the defendant and made a transcript of it; but the transcript was not read over to or by or signed by the defendant. At the trial parol evidence of the shorthand writer was tendered and received of statements or admissions made by the defendant in the course of his examination of facts tending to establish the misdemeanours with which he was charged.

The question is, was that parol evidence properly admitted? It was argued that it was improperly admitted—first, on the ground that the examination, having been adjourned sine die, was not completed, and therefore the prisoner might not have had the opportunity of making a complete statement and explanation. As to this, it is to be observed that the deputy recorder has in the case before us found as a fact that no incomplete statement was given in evidence—by which I understand him to mean that the statements of which evidence was

(1) 16 State Trials, 214, 215.
(2) 2 Lea. C. C. 552.
(3) 28 L. J. (M.C.) 91; Bell, C. C. 97.

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given were not fragmentary, but were, as far as the particular facts dealt with by them, complete. This, however, is not, I apprehend, the character of the objection in fact urged. That objection I understand to be that, even if otherwise admissible, the parol evidence of the statements made was not admissible because the examination was adjourned sine die, and was not in that sense complete. In my judgment, whichever form the objection takes it is one which goes only to the effect and weight of the evidence, and not to its admissibility. If the jury thought that the statements were fragmentary or incomplete it would properly affect the weight they would think it just to attribute to them, but their admissibility would not be thereby affected.

The second and main objection urged is that upon the true construction of the 17th section of the Bankruptcy Act, 1883, the only evidence which can be received of the statements made by the bankrupt is the transcript taken down in writing and read over to and signed by the debtor under that Act, or read over by the debtor and signed by him under the later Act of 1890. A further objection urged was that any such transcript, even if read over and signed, would not be admissible in a criminal prosecution, and that, a fortiori, parol evidence of statements made during examination was not admissible in such a prosecution. In support of these objections the principle "Nemo tenetur se ipsum accusare" was relied upon. I proceed to consider these contentions. The principle referred to has undoubtedly been regarded as an important one. Lord Eldon described it as one of the most sacred principles of the law: *Ex parte Cossens, Re Worrall.* (1) But he proceeds to point out that he has always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, namely, that a bankrupt cannot refuse to discover his estate and effects and particulars relating to them, though in the course of giving information to his creditors that information may tend to shew that he has committed a criminal offence. He points out that under the law then existing, while the commissioners would not compel the bankrupt to answer a question directly

(1) 1 Buck, at p. 540.

aimed at incriminating him, they would compel him to answer questions which might tend in that direction. I am, however, relieved from the necessity of considering old authorities on this subject as express statutory provisions have taken the place of usage and judicial authority, and the latter are only useful in so far as they may throw light upon the proper principle of construction to be applied to the Acts of the Legislature. By the Bankruptcy Act of 1849, s. 117, it was provided that the Court might summon the bankrupt before it, and, if necessary, compel his attendance by warrant, and that it should be lawful for the Court to examine the bankrupt (after he had made a solemn declaration to speak the truth) touching all matters relating to his trade, dealings, or estate, or which might tend to disclose any secret grant or concealment, and to reduce his answers into writing, which examination, when reduced into writing, the bankrupt should sign and subscribe. The construction and effect of that section were carefully considered in the case of *Reg.* v. *Scott* (1), decided in 1856. In that case the answers of the bankrupt had been reduced into writing and signed by him. Questions were put to the bankrupt, and answered by him under threat of committal, in relation to his trade books; and these are stated, in the case framed by Willes J. for the opinion of the Court for Crown Cases Reserved, to have influenced the jury against the prisoner, and tended to cause his conviction. It was objected in that case that the statements being made after a declaration tantamount to an oath they were inadmissible; secondly, that they were not voluntary; and thirdly, were made after threats from a person in authority; but the Court (Coleridge J. dissenting) held that the signed statement was admissible. As to the first objection, the Court held that if the examination was taken under oath administered by proper authority it is admissible. As to the objection that the statements were not voluntary, it was held that such an objection does not apply to a lawful examination in the course of a judicial proceeding; and, as to the alleged threats, that they were no more than a warning to the defendant of the consequences which in point of law would follow from

(1) 25 L. J. (M.C.) 128; 1 Dears. & B. C. C. 47.

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his refusing to give a true answer to the questions put to him. Lastly, as to the arguments based upon the principle "Nemo tenetur se ipsum accusare," the Court held that the statute of 1849 had in the case in question taken away this privilege by enacting that he must answer touching all matters relating to his trade or estate without any qualification. It is to be observed that in this case there was no express provision that the answers of the bankrupt should be admissible in evidence against him. In my judgment, the principles enunciated in this case (with the decision in which I entirely agree) practically determine the present case; but, as the precise question here reserved turns upon a later statute, it is necessary to examine that later statute. The examination in question took place under the Bankruptcy Act of 1883, s. 17, which provides that the Court may appoint a day for the examination of the debtor at which he shall be examined as to his conduct, dealings, and property. It provides that the Court may adjourn the examination from time to time; that the official receiver may take part in the examination, and, if authorized, may employ a solicitor with or without counsel; a trustee, if appointed before the examination concludes, may take part in it; the Court may put such questions to the debtor as it may think expedient; and, lastly, it is provided in these terms (sub-s. 8): "The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times." Finally, by sub-s. 9, "When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded." As to the subjects upon which the debtor may be examined, it is to be observed that his "conduct" is included—a word not found in the 117th section of the Act of 1849. In my judgment, this makes no difference, and I think that under the former Act the matters intended to be covered, as I conceive, by that word in the later section could have been

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made the subject of examination under the former Act. It seems to me that "conduct" there relates to the matters referred to in s. 28 dealing with the considerations which the Court ought to weigh as to granting or refusing an order of discharge, or as to the terms on which such order may be granted. To return to the construction of this section. It will be seen that the examination, if authenticated as provided in sub-s. 8, may thereafter be used in evidence against the bankrupt without any qualification pointing to its exclusion in the case of criminal proceedings. Indeed, seeing that a bankrupt is not likely to be the subject of civil proceedings, it is more difficult to suppose that the exclusion of criminal proceedings could have been intended. I think, therefore, it must be taken as clear, conformably with the decision in *Reg.* v. *Scott* (1), that, if duly authenticated as provided by sub-s. 8, the examination could properly be used against the defendant on a criminal charge. It is equally clear that, not being regularly authenticated, it cannot be put in evidence. If it could, it would become in itself, without further proof than compliance with the formal provisions of the Act, substantive evidence; but the point that we have here to decide is, is such authenticated examination the sole evidence which can be given of statements or admissions of the defendant during his examination? I am clearly of opinion that it is not. In the first place, the statute does not say that it shall be the only evidence of his statements. In the next place, his statements have been made on an occasion when he was under lawful examination on oath, and therefore are not to be regarded as induced by threats or promises or under undue influence—circumstances which would properly cause them to be regarded as not being voluntary, and therefore inadmissible. I regard the statutory provision, therefore, as one intended to provide only for the most authentic way of presenting to the Court the statements made, but not at all as intending to exclude all other modes of giving evidence of statements made by the defendant in the course of his examination. We cannot give effect to the objection made without construing the statute as if it had said—which it does not—that the authenticated

(1) 25 L. J. (M.C.) 128; 1 Dears. & B. C. C. 47.

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examination shall alone be received as evidence of the statements so made. If, then, this view is correct, is there any rule of law by which this evidence should be excluded? I know of none. I take the general rule to be (apart from any express statutory exceptions) that any statement made by a party relevant to the matter in hand may be given in evidence against him in any civil case, and also in any criminal case, except where such statement is made upon oath improperly administered, or where such statement is not voluntary within the principle to which I have already referred. I think this view is strengthened by the provisions in the Bankruptcy Act, 1890, which, by s. 27, sub-s. 1, repeals so much of s. 85 of the 24 & 25 Vict. c. 96, as provides that no person shall be liable to be convicted of any of the misdemeanours mentioned in ss. 75 to 84 of that Act (being frauds by agents, bankers, or factors) if he shall have first disclosed the same in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy or insolvency, and which further provides, in sub-s. 2, that a statement or admission made by any person in any compulsory examination in bankruptcy shall not be admissible as evidence against that person in any proceeding *in respect of any of the misdemeanours referred to in s.* 85. It is noticeable that sub-s. 2 does not speak of a signed statement or examination, but of a statement or admission—the latter a word which can hardly be taken to be descriptive of a formal statement read over to or by and signed by the bankrupt or other person. But more—while it expressly negatives the admissibility of a statement or admission made in any compulsory examination or deposition before any Court, on the hearing of any matter in bankruptcy where the proceedings are in respect of any of the misdemeanours referred to in s. 85 of the Larceny Act of 1861, it is wholly silent as to any proceeding in respect of misdemeanours (such as are here in question) outside the Act of 1861. It has been objected that the broad principle which I have expressed would recognise the admissibility of the evidence of any person as well as of the shorthand writer as to statements or admissions made by a bankrupt during his examination. This is quite true—it would. But

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this seems to me to be only an objection to the weight and reliability of the evidence, not to its admissibility; and I have no fear that in the application in practice of the principle enunciated both judges and juries may not well be trusted to discriminate between evidence of statements accurately recorded and formally authenticated, and evidence of statements which do not fall within that category. In the result, therefore, the conviction will be affirmed.

The rest of the COURT (Pollock B., Hawkins, Cave, and Wills JJ.) concurred.

Conviction affirmed.

Solicitor for the Crown: *The Solicitor to the Treasury.*
Solicitor for defendant: *E. F. S. Pearson, Leeds.*

W. A.

DRURY, APPELLANT; THE ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY, LIMITED, RESPONDENTS.

1896
May 13.

Metropolis—Buildings—Party Wall—The London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 59, 75 (*Local*).

By s. 75 of the London Building Act, 1894, certain buildings of the warehouse class must be "divided by party walls," and party walls by other provisions of the Act must be constructed according to specified requirements. A building, to which s. 75 would apply, was proposed to be erected, some portions of it being of a much greater height than others, and the walls which divided the higher from the lower portions were to be carried up above the roof of the lower so as to form the outside walls of the higher:—

Held, that s. 75 only made a wall a party wall in respect of its dividing one portion of the building from another; so that the walls in question would cease to be party walls when carried up above the roof of the lower portions of the proposed building.

CASE stated, under the Summary Jurisdiction Acts, by a metropolitan police magistrate.

The respondents on the case stated appealed to the magistrate

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sitting at the Westminster Police Court, under s. 150 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), against a notice of objection by the appellant, the district surveyor for the London County Council, to certain building work proposed to be carried out by the respondents.

The following facts were proved or admitted before the magistrate:—

The respondents were proposing to erect a building in Coburg Road within the appellant's district, and they gave written notice to the appellant, in accordance with the provisions of the Act, respecting the proposed building and work, from which notice it appeared as follows:—

The building, when erected, would be a building of the warehouse class and of a cubical capacity of 657,408 cubic feet. It would be erected so as to comply with s. 75 of the Act by being divided vertically by five walls. Portions of the building were intended to be erected to the height of five storeys, whilst other portions thereof were intended to be erected to a height of one storey only. Two of the walls dividing the building would separate portions intended to be of the height of one storey only from other portions intended to be of the height of five storeys, such two walls being carried upwards beyond the roof of the portions of the building intended to be of the height of one storey only, so as to form respectively the outside walls of other portions intended to be of the height of five storeys. So far as the two walls extended to a height of three feet above the roofs of the one-storey portions, but so far only, they were intended to be constructed so as to comply with the regulations contained in the Act with respect to the construction of party walls; but, so far as the upper portions of the two walls above the height of three feet above the roof of the one-storey portions were outside walls, it was not intended to construct such walls so as to comply with those regulations, but it was intended to construct them with openings for windows upon each storey for the admission of light and air, and such openings were not intended to be constructed in compliance with the provisions as to openings in party walls contained in s. 54, sub-s. 3, and s. 77, sub-s. 3 of the Act. The appellant gave notice

of objection to these openings for windows as not complying with the Act.

The respondents contended that, admitting that the walls would be party walls within the Act so far as they separated one portion of the building from another, they would, so far as they did not so separate one portion from another, be external walls to which the provisions of the Act as to party walls did not apply. The appellant contended that the walls would be party walls within the Act to the whole of their height. (1)

The magistrate was of opinion that the contention of the respondents was right, and allowed the appeal.

The question for the opinion of the Court was whether the magistrate's decision was right.

H. Avory, for the appellant. The two walls of the proposed building are party walls to their full height, and not merely so far as they separate one portion of the building from another. They are made party walls by s. 75 of the London Building Act, 1894, and being so made s. 59 applies to them, so that they must be carried up as party walls three feet above the roof of the highest building adjoining thereto. There is no question

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5, sub-s. 15: "'The expression 'external wall' means an outer wall or vertical inclosure of any building not being a party wall."

Sub-s. 16: "The expression 'party wall' means—(*a*) a wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners, or occupied, or constructed, or adapted to be occupied, by different persons; or (*b*) a wall forming part of a building and standing, to a greater extent than the projection of the footings on lands of different owners."

Sect. 75: "Except as in this section provided, no building of the warehouse class shall extend to more than 250,000 cubic feet unless divided by party walls in such manner that no division thereof extend to more than 250,000 cubic feet."

[The exception provided by the section does not apply to the building proposed to be erected by the respondents.]

Sect. 59, sub-s. 1: "Every party wall shall be carried up of a thickness in a building of the warehouse class equal to the thickness of such wall in the topmost storey . . . . to such a height as will give a distance (in a building of the warehouse class exceeding thirty feet in height) of at least three feet . . . . measured at right angles to the slope of the roof, or fifteen inches above the highest part of any flat or gutter, as the case may be."

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here of the exercise of a discretion; the respondents are claiming an absolute right to put windows in the walls as if they were not party walls. If the claim be well founded the object of the statute—namely, to avoid fire spreading from one building to another, or from one division of a building of the warehouse class to another division—is not carried out. It is admitted that walls are not party walls above the point at which they cease to be dividing walls, unless they are made so by express enactment: *Weston* v. *Arnold.* (1) That decision was under Bristol Improvement Acts which did not contain such an express enactment. The case, therefore, differs from this, in which there is the express enactment of s. 59. *Knight* v. *Pursell* (2), decided under the Metropolitan Building Act of 1855 (18 & 19 Vict. c. 122), is also different. Fry J.'s decision in that case has been adopted by s. 58 of the Act of 1894.

McCall, Q.C. (*R. Cunningham Glen* with him), for the respondents. Sect. 59 of the London Building Act, 1894, is only a reproduction of the provisions of the Metropolitan Building Act of 1855. The construction has always been put upon metropolitan and other building Acts that a wall ceases to be a party wall and becomes an external wall above the point at which it ceases to be a dividing wall. Both the cases cited for the appellant support this view. Sect. 75 of the Act of 1894 is only intended to make walls party walls so far as they are dividing walls.

WRIGHT J. The question is not free from doubt; but upon the whole I think the magistrate's decision was right. Enactments substantially similar to those in the London Building Act, 1894, were contained in the Metropolitan Building Act of 1855. It is not contended that the decision of the magistrate would have been wrong under the old Act; nor is it, as I think, wrong under the new Act. This is the case of a building of the warehouse class extending altogether to some 650,000 cubic feet, and, being such a building, it must, under s. 75 of the Act of 1894, be divided by party walls in such manner that no division thereof shall extend to more than 250,000 cubic feet. Obviously

(1) L. R. 8 Ch. 1084. (2) 11 Ch. D. 412.

in that section the words "party wall" are used, not in their technical sense, but as a convenient phrase for dividing walls. The question is whether the work intended to be done in this case is in obedience to the enactment. It is intended to obey it by the erection of dividing walls throughout the building as far, at any rate, as the top of the first storey; but at a certain part of the building the building itself is not carried higher than one storey, and there are two of the so-called party walls which abut on either side of this lower portion of the building, thus forming a sort of well. As far as three feet above the roof of the lower portion of the building the walls in question are properly constructed as party walls. From that point upwards they are properly constructed as if they were party walls throughout, with the exception that they have openings for windows, which would not be allowed if the walls are to be considered as satisfying the character of party walls up to their full height. Speaking for myself, I think that even s. 59 does not bear, and has not had put upon it in practice, the construction contended for by the London County Council. When a man builds a party wall as the external wall of his own house, and it overlooks an adjoining lower house, I think the requirements of the law as to party-walls cease at a limited distance above the adjoining owner's house. In my opinion s. 59 ought to be construed in that sense. We need not, however, decide that question here, because the point upon which this case depends arises under s. 75. The real ground of my decision is that s. 75 has not the unnatural effect of making that which is not in the technical sense a party wall into a party wall at any point higher than three feet above the point at which it ceases to be a dividing wall. The walls in question here will be dividing walls up to the top of the first storey, and to that extent s. 75 applies to them; but above the point where they will cease to be dividing walls I do not think s. 75 or any other section makes them party walls in any sense, or attaches to them the obligation that they shall not be pierced by ordinary windows.

On this ground I am of opinion that our judgment should be for the respondents.

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COLLINS J. I am of the same opinion. But for s. 75 the walls would not be party walls. It is contended, however, that by virtue of s. 75, which formed the basis of the argument made for the county council, the two walls which break up this warehouse into sections are constituted party walls, and as such are subject up to their full height to all the provisions of the statute affecting party walls. It is clear, looking at the definition in s. 5, sub-s. 16, that "party wall," in cases not within s. 75, means a wall used for dividing adjoining buildings belonging to different owners. The walls here are used for dividing certain portions of a warehouse, and s. 75 applies; but the essential factor in a "party wall" is the separation of adjoining buildings in the one case, and the dividing of different parts of a warehouse in the other. When the division has been carried out then, if the wall be carried up higher, it does not seem to me that the Act intends it shall be a party wall any higher than three feet above the point at which it ceases to divide one part of the warehouse from another. Counsel for the county council relied on s. 59 as establishing that a wall, any part of which has been a party wall, is constituted a party wall right up to its full height. The case cited—*Weston* v. *Arnold* (1)—though decided, no doubt, under a different Act of Parliament, seems to me a decision that in the absence of any special enactment of the Legislature there is no sort of presumption that a wall which is a party wall in some part of it is a party wall throughout its whole height. In the present case s. 59 is relied on as being such a special enactment, but when that section is examined it does not go so far as is contended. It simply provides that every party wall shall be carried up of a certain thickness, and to such a height above the roof, flat, or gutter of the highest building adjoining thereto as will give a distance (in a building of the warehouse class exceeding thirty feet in height) of at least three feet, measured at right angles to the slope of the roof, or fifteen inches above the highest part of any flat or gutter as the case may be. So far as the wall is a party wall, no doubt it must conform to that provision; but so far as it is not a party wall it is not in any way fettered by the

(1) L. R. 8 Ch. 1084.

restrictions of the Act. The principle of *Weston* v. *Arnold* (1) establishes that a wall is not a party wall when it gets three feet above the roof of the adjoining building unless there is some special statutory provision to make it a party wall above that height; and here, unless it is a party wall above that height, the provisions of s. 59 do not apply to make it be carried three feet above the roof of the higher building. The construction which is sought to be given to s. 59 can only be got at by assuming in the appellant's favour the point which *Weston* v. *Arnold* (1) decided—namely, by assuming that a wall must be a party wall from and after the point where it has ceased to fulfil the purposes of a party wall. Such a construction seems to me unreasonable and contrary to the principle of that decision. For these reasons I am of opinion that we are not bound to look upon these walls above the height of the first storey as being anything but what they are—namely, external walls not used for the purpose of dividing either one house from another, or one portion of a warehouse from another. I, therefore, think that there is no reason why the windows should not be placed as they have been.

Judgment for the respondents.

Solicitor for appellant: *W. A. Blaxland.*

Solicitors for respondents: *Tyrrell Lewis, Lewis & Broadbent.*

(1) L. R. 8 Ch. 1084.

W. A.

1896
June 8.

THE VESTRY OF HAMMERSMITH *v.* LOWENFELD.

Metropolis—Limitation of Actions—Nuisance Order, Costs of obtaining and enforcing—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 11, 117.

The limitation imposed by 11 & 12 Vict. c. 43, s. 11, of the time within which complaints or informations may be made or laid before justices applies to actions in the county court, brought under the Public Health (London) Act, 1891, s. 11, to recover costs and expenses incurred in and about obtaining and carrying into effect a nuisance order; so that such actions must be commenced within six months from the time when the costs and expenses were incurred.

Appeal from a decision of the judge of the Brompton County Court.

The action was brought under s. 11 of the Public Health Act, 1891 (54 & 55 Vict. c. 76) (1), to recover 43*l.* 11*s.*, the

(1) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 11: —"(1.) All reasonable costs and expenses incurred in serving notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; or if the order is made on the sanitary authority, or, if no order is made, but the nuisance is proved to have existed when the notice was served or the complaint made, then of the person by whose act, default, or sufferance, the nuisance was caused; and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises."

"(2.) Such costs and expenses, and any fines incurred in relation to any such nuisance, may be recovered in a summary manner or in the county court or High Court, and the court shall have power to divide costs, expenses and fines between persons by whose acts, defaults, or sufferance a nuisance is caused as to it may seem just."

Sect. 117: "(1.) All offences, fines, penalties, forfeitures, costs and expenses under this Act or any by-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts."

"(2.) Proceedings for the recovery of a demand not exceeding fifty pounds, which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the county court as if such demand were a debt."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, "in

amount of the costs and expenses incurred by the plaintiffs in and about serving a notice, making a complaint, and obtaining and carrying into effect a nuisance order against the defendant.

The costs and expenses were incurred more than six months before the action in the county court commenced. It did not appear that the magistrate had fixed, or had been asked to fix, the amount of the costs and expenses sought to be recovered in the county court.

The defence in the county court was that the action was barred, being subject to the limitation of six months imposed by the Summary Jurisdiction Act, 1848, s. 11, in respect of summary proceedings before magistrates.

The county court judge held that defence good, and gave judgment for the defendant.

The plaintiffs appealed.

Macmorran, Q.C., for the appellants. The limitation of the time within which complaints or informations may be made or laid imposed by s. 11 of the Summary Jurisdiction Act, 1848, does not apply to actions brought under s. 11 of the Public Health (London) Act, 1891. It must be admitted that if the action was brought under s. 117 of the Act of 1891 the limitation would apply because of the decision in *Tottenham Local Board* v. *Rowell.* (1) That decision was upon sections of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), the provisions of which are practically reproduced in s. 117 of the Act of 1891, with the exception that under the two earlier Acts demands only below 20*l.*, which was then the limit of the jurisdiction of the county court, might be recovered in the county court. The ground of the decision was that s. 24

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all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(1) 1 Ex. D. 514.

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of the Act of 1861 gave an "option" to proceed in the county court, where the demand was under 20*l.*, instead of summarily before justices. That ground, however, does not apply here. Sect. 11 of the Act of 1891 deals with cases of nuisances only; there is no limit of the amount of the demand, and no such "option" given as in s. 117. The two sections are wholly distinct, referring to different subject-matters. Sect. 117 deals with a great number of expenses in respect of matters other than nuisance orders recoverable summarily under the Act, and gives the option only when the demand is under 50*l.* Sect. 11 creates a civil debt; the costs and expenses recoverable under it are to be deemed to be money paid for the use and at the request of the person on whom the nuisance order has been made.

H. Courthope Munroe, for the respondent. If the contention for the appellants be well founded a local authority may lie by for at least nearly six years after the expenses have been incurred before bringing their action under s. 11 of the Public Health (London) Act, 1891. The Legislature cannot have intended such a state of things. The action does not lie unless the amount of the costs and expenses sought to be recovered has been assessed by the magistrate before whom the proceedings to obtain a nuisance order were taken. He has to exercise his discretion what costs and expenses shall be allowed, and until he has done so, no debt recoverable in the county court under s. 11 has come into existence. Secondly, the limitation imposed by s. 11 of Jervis' Act applies to this action. The case is governed in principle by the decision in *Tottenham Local Board* v. *Rowell.* (1) Sect. 11 does give an option to recover costs and expenses, incurred in and about obtaining and carrying into effect a nuisance order, either in a summary manner or in the county court or High Court. By the operation of ss. 11 and 117 if the claim is under 50*l.* they may be recovered either in a court of summary jurisdiction or in the county court; if over 50*l.*, either in a court of summary jurisdiction or in the High Court.

Macmorran, Q.C., in reply. It is not a condition precedent

(1) 1 Ex. D. 514.

to the right to bring an action under s. 11 of the Act of 1891 that the magistrate shall have fixed the amount of the costs and expenses sought to be recovered. He cannot fix the costs of subsequently carrying his order into effect.

CAVE J. I am of opinion that the defendant is entitled to our judgment. I think this case is really not distinguishable from *Tottenham Local Board* v. *Rowell*. (1) The first mode pointed out by the Act of obtaining and enforcing a nuisance order is to go before the magistrate. If the order be made, or if a fine be imposed and not paid, an option is given of recovering the costs and expenses or the fine either by summary proceedings or by an action in the High Court or county court. The first and most natural thing to do is to proceed summarily; and if that course be taken, the limitation of time provided by s. 11 of the Summary Jurisdiction Act, 1848, applies. The decision in *Tottenham Local Board* v. *Rowell* (1) is that when an option is given to proceed either summarily or in the county court, and a limitation of time is imposed with respect to proceeding summarily, that limitation applies also to the proceeding in the county court. The arguments by which that decision was arrived at may seem to run rather fine, but we are bound by it unless the case can be distinguished from the present. I am of opinion that it cannot be distinguished; and, therefore, the judgment appealed against was right.

WILLS J. I am also of opinion that the decision of the county court judge was right. It is admitted by the appellants' counsel that if their action had been brought under s. 117 of the Act of 1891 it would be impossible to contend that this case was not governed by the decision in *Tottenham Local Board* v. *Rowell*. (1) The Court of Appeal there held that where, under statutory provisions similar to those contained in s. 117, the recovery of costs might be enforced at the option of the person seeking to recover them either in a court of summary jurisdiction or in the county court, the limitation fixed by the Summary Jurisdiction Act, 1848, of the time within which

(1) 1 Ex. D. 514.

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Wills J.

summary proceedings may be taken applied to an action in the county court—that the remedy in both cases was subject to the same limitation of the time within which it could be enforced. I think it is impossible to draw a distinction between s. 117 and s. 11. The language of s. 11 is somewhat different, but there is no difference in substance. Sect. 11 says that "such costs and expenses may be recovered in a summary manner or in the county court or High Court." What is that but saying that the person entitled to recover them may at his option select either the court of summary jurisdiction, or the county court, or the High Court in which to pursue his remedy? I cannot see that the option given is any the less an option because the words "at the option" are not used. If that view be right, no real distinction can be drawn between s. 11 and s. 117. I am of opinion that the case before us is really governed by the decision of the Court of Appeal in *Tottenham Local Board* v. *Rowell* (1), and, therefore, that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants: *Watson, Sons & Room.*
Solicitor for respondent: *A. Arnold Hannay.*

(1) 1 Ex. D. 514.

W. A.

Applied. SOLICITOR. BIRCH *v.* TREASURY [1950] 2 All E.R. 1198.

CAIN *v.* MOON.

1896
May 5.

Donatio Mortis Causâ—Essentials to Gift—Delivery antecedent to Gift.

The rule that delivery of a chattel is essential in order to constitute a valid donatio mortis causâ is satisfied by an antecedent delivery of the chattel alio intuitu to the donee.

APPEAL from the judge of the Southwark County Court.

The action was brought by the plaintiff, as the administrator of his deceased wife, against her mother, the defendant, to recover a deposit note for 50*l.* standing to the credit of the deposit account of the deceased at a London bank. The circumstances under which the defendant claimed the right to retain the note were shortly as follows.

The money had been deposited at the bank by the deceased in 1890, and a deposit note given to her for the amount; the note was placed by her in a small cashbox, which was kept locked, and of which she retained the key. In the early part of 1893 the deceased had an illness, and, after her recovery, about the end of June of that year, the defendant, who had behaved with great kindness to her during the illness, paid her a visit. During this interview the deceased handed the deposit note to the defendant, saying that she was never to part with it, and that it was for her for her past kindness to her during her recent illness; the deceased, whose relations with her husband were strained, added that she felt sure that she should some day have to come home to live with her mother (the defendant), as if she were to get ill again she was sure that her husband would not keep her, or give her any money. A surviving daughter and another witness, who were present at the interview, said that the deceased said that the defendant was never to part with the note; that it was for past services, and was for her when she (the deceased) died. From that day the deposit note had remained in the possession of the defendant with the full knowledge of the deceased, who frequently spoke about it and asked if it was safe. On September 30, 1895, the defendant paid a visit to the deceased, who was then seriously ill; the

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deceased said that she did not think she could live, and, referring to the deposit note, said, "Everything I possess and the bank-note is for you if I die." The deceased died on October 5, 1895, and, the defendant having refused to give up the deposit note to the plaintiff, this action was brought. On behalf of the defendant it was contended (1.) that what took place in June, 1893, amounted to a valid gift inter vivos of the deposit note; (2.) if not, that there was a good donatio mortis causâ on September 30, 1895. The learned judge found that there had not been a complete gift inter vivos, but that there had been an effectual donatio mortis causâ, and gave judgment for the defendant. The plaintiff appealed.

Hopkinson, Q.C. (*Cecil Chapman* with him), for the plaintiff. What happened in 1893, when the note was originally handed to the defendant, did not amount to a valid gift inter vivos, nor has the county court judge so found; its effect was to make the defendant a trustee of the note for the deceased. Neither was there in September, 1895, a good donatio mortis causâ, to which delivery is essential; what was done by the deceased on her deathbed did not amount to a "traditio" or delivery. The delivery must be a physical outward act; either the thing itself, or the documents of title, must be handed over to the donee. Here there could be no delivery, the note having for a long time been in the possession of the donee, and, therefore, one of the essential conditions of a valid donatio mortis causâ was not complied with.

[WILLS J. *Richer* v. *Voyer* (1) shews that in Canada, where delivery is essential to a gift of chattels, the anterior possession of property is equivalent to delivery at the time of the gift.]

That decision, which is not binding upon this Court, was a question of gift inter vivos, and not of donatio mortis causâ. [He cited *Moore* v. *Moore* (2); *Duffield* v. *Elwes* (3); *Edwards* v. *Jones*. (4)]

Astbury, Q.C. (*J. C. Gordon* with him), for the defendant, was directed to confine his argument to the question whether,

(1) L. R. 5 P. C. 461.
(2) L. R. 18 Eq. 474.
(3) 1 Bli. (N.S.) 497.
(4) 1 My. & Cr. 226.

the note being in the possession of the donee, there could be a good donatio mortis causâ, there being no means of making actual delivery. There had been a prior actual delivery to the defendant, which was sufficient to make a gift inter vivos had the attendant circumstances clearly shewn the intention of the deceased to make such a gift. The defendant was in possession as bailee down to September, 1895, when the character of her possession became changed into possession as owner. In the judgment of Wightman J., in *Winter* v. *Winter* (1), it is not contested that possession of a chattel in one character can be turned into possession in another character by the expression of the donor's intention to that effect. It is to be gathered from the judgment of Fry L.J. in *Cochrane* v. *Moore* (2) that delivery of a chattel need not be contemporaneous with the gift. There is no good reason why the anterior possession of property should not be equivalent to its delivery at the time of gift, and the decision in *Richer* v. *Voyer* (3) is in accordance with sound sense.

Hopkinson, Q.C., in reply.

LORD RUSSELL of KILLOWEN C.J. I have come to the conclusion that this appeal must be dismissed. The action was brought by the appellant, suing as administrator of his late wife, against her mother. The defendant claimed the right to retain a deposit note for 50*l.*, and based her title practically on two grounds: first, that there had been a gift inter vivos, and, secondly, that there had been a donatio mortis causâ. It is clear that both those grounds cannot stand together; it is equally clear that, though both are put forward as defences to the action, the real ground on which reliance is placed is that there has been an effectual donatio mortis causâ. The county court judge came to the conclusion that that contention had been made out, and decided on that ground in favour of the defendant; he was the judge of the facts, and the proper person to draw inferences from the facts, while it is for us on this appeal to consider whether his conclusion was wrong, assuming the

(1) 4 L. T. (N.S.) 639. (2) 25 Q. B. D. 57.
(3) L. R. 5 P. C. 461.

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facts to be as he has found them. I do not suggest that I should not have found the facts as he did: I merely point out that the question is whether there was evidence before him upon which he could properly arrive at the conclusion at which he did arrive.

It is admittedly common ground that a deposit note such as that in the present case *may* be the subject of a donatio mortis causâ. It is further conceded that for an effectual donatio mortis causâ three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and, thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover. This last requirement is sometimes put somewhat differently, and it is said that the gift must be made under circumstances shewing that it is to take effect only if the death of the donor follows; it is not necessary to say which way of putting it is the better. In the first place, was there here a gift in contemplation of death? It is clear that, if what took place during the illness of the deceased in September, 1895, was a good donatio mortis causâ, it was made in contemplation of death. It is equally clear from the circumstances attending the transaction of that date that there was a gift by the deceased, and that it was the intention of the deceased that the property in the gift was intended to revert to her in case of her recovery. This is hardly contested. The argument proceeded upon the main point whether there was a delivery, or whether the defendant had satisfied the requirement of delivery, within the rule as to donationes mortis causâ.

The great argument on behalf of the plaintiff was that the facts shewed that there was only an imperfect gift inter vivos, and not a donatio mortis causâ at all. It is, therefore, necessary to see what was the evidence, and whether it justifies the conclusion of the county court judge. The important evidence is that of the alleged donee, the mother of the deceased. She says that she attended her daughter during her illness; that there were differences between the deceased and her husband; that in

June, 1893, the deceased handed the deposit note to her, telling her that she was never to part with it, and that it was for her kindness to her during her illness. If this was an unqualified handing over of the deposit note to the defendant, it points to a gift inter vivos. The deposit note has never left the possession of the defendant since. At a later date, however, the deceased said to the defendant, "Have you got the deposit note safe? Never part with it. The bank-note is for you if I die." This incident affords a very clear intimation of the state of mind of the donor—that she had not then parted with the note by way of gift. The defendant, too, said that she did not consider the note would be her own until after her daughter's death, and that if her daughter had wanted it back she should have given it to her. Then comes the evidence of the witness Charles Last: the deceased had given the note to him, and had taken it back. It is clear that it was not her intention to part with the note by way of gift, but only to part with the possession of it, so that it might be in safe keeping. Then there is the surviving daughter's evidence as to what took place on the occasion when the note was handed to her mother, when, as she says, the deceased said that the defendant was never to part with it; that it was for past services, and that it was for her when she (the deceased) died. And the evidence of the witness Lilian Molyneux is to the same effect. I think the plaintiff's counsel was justified in saying that the evidence was capable of being considered as shewing an incomplete gift inter vivos; but I should myself, looking to the whole of the case, have come to the same conclusion as the learned county court judge, that the note was not handed over to the defendant by way of an intended gift, nor upon trust, but merely for safe keeping, the deceased having it in her mind at the time that, if she died, it was to go to her mother. I have come, therefore, to the conclusion that there was not a gift inter vivos, nor a gift to the mother on trust for the daughter, but a delivery for safe keeping, and I think that the evidence is amply sufficient to support that view.

Then comes the question, was there an effective donatio mortis causâ? Now, two of the three conditions of a good donatio mortis causâ existed here, for the gift was made in contemplation of death, and with the intention that it should

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revert to the donor in case of her recovery; but it is said that the third essential condition of such a gift was not satisfied, because there was no delivery. If there were authority to the effect that an antecedent delivery cannot be treated as a delivery within the meaning of the rule as to donationes mortis causâ, though made alio intuitu, I should, of course, give effect to it; but there is no such authority, and the question must therefore be considered and decided on grounds of principle and good sense. If, when the defendant visited her daughter in her last illness, she had had the note in her purse, and, when her daughter expressed her intention of benefiting her, she had handed the note to her, and the latter had handed it back accompanied with the language which she did in fact use, the case would be unarguable: because this form was not gone through, is the transaction to be deprived of the character of a donatio mortis causâ which it would otherwise have borne? I think not. I concede that there must be a delivery to the person to be benefited of the subject of the donatio mortis causâ; but, in my judgment, there is no reason why an antecedent delivery should not be effective. The case of *Richer* v. *Voyer* (1), though not a decision binding upon us, is really much in point, for there, under a provision of the Canadian Civil Code which required gifts of moveable property to be accompanied by delivery, it was held that anterior possession, though for another purpose, of property which could be the subject of don manuel, was equivalent to delivery at the time of the gift. I think, therefore, that in the present case all the conditions legally necessary for an effective donatio mortis causâ were complied with, and this appeal must, consequently, be dismissed.

WILLS J. I am of the same opinion. I think there was ample evidence upon which the learned county court judge might find (as I understand he did find) that up to the time of the second transaction on September 30, 1895, the defendant had been in possession of the note as bailee of it for her daughter, with a liability to return it when called upon. If that is so, the only effective question for our determination is

(1) L. R. 5 P. C. 461.

whether a delivery anterior to the date of the gift is sufficient to satisfy the rule that a gift of chattels is not effective unless there be a delivery of the thing to the intended donee. There is no direct authority upon the point either way; and I agree with my Lord that we must look at the reason and good sense of the matter. There seems no satisfactory reason why an antecedent delivery should not be sufficient; and certainly the case of an antecedent delivery must be one of frequent occurrence. I may, perhaps, repeat an illustration which I put during the argument. Suppose a man lent a book to a friend, who expressed himself pleased with the book, whereupon the lender, finding that he had a second copy, told his friend that he need not return the copy he had lent him: it would be very strange if in such a case there were no complete gift, the book being in the possession of the intended donee.

I do not desire to ground my judgment upon the case of *Winter* v. *Winter* (1), because in that case the possession of the donee before the gift was made was that of a servant; still, all the evils which are supposed to be capable of arising from secret donations are complete in such a case, just as much as when the chattel is in the possession of a person who is not a servant. In *Winter* v. *Winter* (1), if there was a gift at all, it must have been complete whether the donee were a servant or not. There are many requisites to an effective donatio mortis causâ which are not necessary in the case of a gift inter vivos; but the necessity for delivery is the same, and there is no reason why in that respect the rule should be different. I think, therefore, that the antecedent delivery of the note to the defendant to hold it in a different capacity, the capacity in which she held it being changed by what took place subsequently when the donatio mortis causâ was effected, was a sufficient delivery to satisfy the rule requiring delivery in gifts of chattels.

Appeal dismissed. Leave given to appeal. (2)

Solicitor for plaintiff: *D. H. Tompkins.*
Solicitors for defendant: *Seeley & Son.*

(1) 4 L. T. (N.S.) 639.

(2) No appeal was brought.

W. J. B.

1896
April 14.

[RAILWAY AND CANAL COMMISSION.]

NEW UNION MILLS COMPANY *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Regulation—Application for Disintegration of Charge—Charge below Statutory Maximum—Sufficiency of Answer—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 33, *sub-s.* 3.

Where an application is made under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888, to the secretary of a railway company by a person interested in the conveyance of merchandise over the railway for an account dividing the charge made for carriage and distinguishing the charge made for conveyance on the railway from the terminal charges (if any) and from the dock charges (if any), it is sufficient, if the total charge made is below the company's statutory maximum charge for conveyance, for the railway company to make a formal answer that the whole charge is in respect of conveyance, and that no charge is made in respect of terminals or of dock charges.

APPLICATION under s. 9 of the Railway and Canal Traffic Act, 1873, to hear and determine a difference which had arisen under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888 (1), between the parties to the application.

It appeared from the application that on November 21, 1894, the New Union Mills Company, being persons interested in the carriage of 200 sacks of wheat which had been carried over the line of the railway company on October 31 and November 1 from the grain warehouses of the Mersey Docks and Harbour Board at Birkenhead to Birmingham for delivery at the mill of the New Union Mills Company, made application in writing

(1) By 51 & 52 Vict. c. 25 (the Railway and Canal Traffic Act, 1888), s. 33, sub-s. 3, "The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified."

to the secretary of the railway company under s. 33, sub-s. 3, of the Act of 1888, calling on the company to render an account in which their charge of 11*s.* 3*d.* per ton for the carriage of such merchandise should be divided, and the charge for conveyance on the railway distinguished from the terminal charges (if any) and from dock charges (if any), and requesting that, if any terminal charge or dock charge were included in such account, the nature and detail of the terminal expenses or dock charges in respect of which it was made should be specified. To this the secretary of the railway company replied by a letter, of which the following are the material portions: "I have to remind you that the traffic to which you refer is still in course of transit, and therefore you are not entitled to make an application in respect of it under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888. I have also to inform you that the Great Western Railway Company contend that the sub-section referred to was only intended to have effect where the total charge made exceeds the amount which is authorized for conveyance charges. As you are no doubt aware, the sum charged upon the traffic your application refers to is less than the powers of the company enable them to charge for its conveyance, and the charge which you refer to is not made up of a charge for conveyance on the railway and a charge for terminal services. Terminal services are rendered and conveyance is performed in respect of the traffic; but the charge which is made is based upon all the considerations affecting the traffic, and has no exclusive relation to the charges which the company are authorized to make for conveyance, and to the charges which the company are authorized to make for terminal services. Under these circumstances, and without prejudice to the position of the Great Western Railway Company in respect of the contentions which I have already mentioned, I have to inform you that, for the purpose of the application made by you under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888, the charge to which that application refers is a charge within the amount the company are authorized to charge for conveyance alone over the railway, and therefore no terminal or dock charges are added."

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For the purposes of this application it was admitted that the traffic had on November 21, 1894, been carried over the railway of the railway company.

The traffic was loaded in the railway company's trucks by the servants of the Mersey Docks and Harbour Board, by whom it was hauled over the railway lines of the said board by their engines or the engines of their contractors up to the junction of those lines with the railway company's railway, and in respect of the said services the railway company paid to the Mersey Docks and Harbour Board the sum of 8*d.* per ton. It was thence conveyed by the railway company to their Hockley Station in Birmingham, unloaded there by the railway company's servants, and (with the exception of twenty-five sacks which were carted by the mill company) was carted to the mill company's mill by the railway company.

The charge of 11*s.* 3*d.* did not exceed the maximum charge which the railway company was authorized to make for conveyance alone of the traffic.

The difference which the parties desired to have determined by the Commission was whether the mill company were entitled under the above-mentioned section to have the charge for the traffic divided. The mill company contended that the charge comprised a remuneration to the railway company for every service rendered and accommodation provided by the railway company in respect of such traffic, and that it did in fact and within the meaning of the sub-section include charges for terminal accommodation and terminal services (including the sum paid to the Mersey Docks and Harbour Board) as well as charges for conveyance over the railway and for delivery, and that the railway company were bound to divide the charge of 11*s.* 3*d.* into charge for conveyance, terminal charges and dock charges (if any), and to specify the nature and detail of the terminal or dock charges and charges for delivery in Birmingham.

Balfour Browne, Q.C. (*Carver* and *Rowland Whitehead* with him), for the applicants. The railway are bound by the express language of the section to render an account; they are not

excused from compliance by reason of the fact that their total charge is below the maximum rate which they are entitled to charge for conveyance alone. [He was stopped by the Court.]

Cripps, *Q.C.* and *Asquith*, *Q.C.* (*Ernest Moon* with them), for the railway company. It is admitted that an account must be rendered in some shape; the real question between the parties is whether an account in which it was said that the dock charges were nil and the terminals were nil would be a compliance with the section; it is submitted that it would. Where a charge is within the statutory maximum charge for conveyance, and the company find it convenient to apply it to conveyance only and not to other charges, they may do so. This is clearly the opinion of Mr. Commissioner Miller in *Greenwood* v. *Lancashire and Yorkshire Ry. Co.* (1); and the same view is expressed by Wills J. in *Tomlinson* v. *London and North Western Ry. Co.* (2) This is also one of the points decided in *Howard* v. *Midland Ry. Co.* (3), which went further, and held that in such a case a customer who did not require station services was not on that account entitled to a rebate: this portion of the decision may have been overruled by s. 4 of the Railway and Canal Traffic Act, 1894, but the rest of the decision, as it appears in the second paragraph of the head-note, is still good law. *Baxendale* v. *Great Western Ry. Co.* (4) is distinguishable as being a case of undue preference; but there is no suggestion throughout that case that a railway company cannot afford gratuitous services to customers, if it does so equally to all. The language of s. 33, sub-s. 3, clearly contemplates cases where there may be no terminal or dock charges. The law has not been altered by s. 4 of the Act of 1894.

Balfour Browne, *Q.C.*, in reply. The allocation of this whole charge to conveyance only is a "colourable pretence," as was said in *Baxendale* v. *Great Western Ry. Co.* (4), and the charge should be disintegrated. In *Howard* v. *Midland Ry. Co.* (3) the railway company had, as the law then stood, no power to make a charge for terminal services at all, but only to charge

(1) 6 Ry. & Can. Traff. Cas. 39.
(2) Not reported. Decided on Oct. 28, 1890.
(3) 3 Ry. & Can. Traff. Cas. 253.
(4) 1 Ry. & Can. Traff. Cas. 202.

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an inclusive rate, and therefore disintegration was impossible in such a case. In *Jones* v. *North Eastern Ry. Co.* (1), where to an application under s. 14 of the Act of 1873 the railway company answered that the rates charged were mileage rates within their parliamentary powers, an order was nevertheless made that they should distinguish how much of the rates was for conveyance and how much for other expenses.

[COLLINS J. In that case the company did not say that they made no charge for "other services."]

Tomlinson v. *London and North Western Ry. Co.* (2) turned largely on the purely technical point that s. 14 of the Act of 1873 did not apply to private sidings, the decision being that under the circumstances the company were not bound to say whether they made any charge in respect of private sidings. The law is modified in this respect by the Act of 1894.

COLLINS J. This is an application under s. 9 of the Act of 1873, whereby we are invited to determine a difference that has arisen between the parties. The point that they wish to have decided is not indeed very clearly stated in the application; but certain admissions have been made, and I take it that two points arise for our determination. The first point is, whether, under the circumstances of the case, the Great Western Railway Company are bound to render to the applicants an account disintegrating their rate under s. 33, sub-s. 3, of the Act of 1888; the second is whether, if they are so bound, they satisfy their obligation by asserting in a formal document that their whole charge is for conveyance, and that no part of it is in respect of any other services. The first point is really too clear for discussion, and was in fact given up by counsel for the railway company at the commencement of the argument; the obligation imposed by the section attaches to the railway company, and they are bound to render an account "in which the charge for carriage shall be divided, and the charge for conveyance over the railway distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature

(1) 2 Ry. & Can. Traff. Cas. 208. (2) Not reported.

and detail of the terminal expenses or dock charges" must be specified.

The further question may be put thus: the total charge being below the maximum rate which the railway company is authorized to charge in respect of conveyance, and no charge being (as is contended) made in respect of terminal or dock charges, will the railway company, if they say this in answer, have sufficiently complied with the requirements of the section? It seems to me that the law is that such a statement by them will be a sufficient compliance; indeed, the point seems to have been expressly decided in *Tomlinson* v. *London and North Western Ry. Co.* (1) by Wills J. in the course of the argument. There application had been made for an order, under s. 14 of the Act of 1873, requiring the railway company to distinguish in its rate-book how much of each rate was for conveyance of traffic on the railway, and how much for other expenses, including details of such expenses; and the question for the decision of the commissioners was whether the order was complied with if the railway company merely put in a blank under "other expenses," indicating thereby that no charge was made under those heads. The point was put in argument, and Wills J. said in answer: "I think, and all the Court are inclined to take the same view, that we cannot interfere with the exigencies of trade in respect of competition, and we cannot compel you to say that you perform for something a service which you choose to say you perform for nothing." And again he says: "I do not see myself, and both my colleagues agree with me, what right we have to say to you that you must make a charge for this or that. One knows perfectly well that you cannot put on a charge which the traffic will not bear." That is the law, and it follows earlier decisions under earlier Acts in which the same view was taken. The opinion of Mr. Commissioner Miller in *Greenwood* v. *Lancashire and Yorkshire Ry. Co.* (2) is to the same effect. It seems, therefore, to be clearly law, or, at any rate, to have been so down to the Act of 1894, that such a formal statement by the railway company would be a good discharge of the obligation imposed upon them to render,

(1) Not reported.

(2) 6 Ry. & Can. Traff. Cas. 39, at p. 47.

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upon request, a specific account disintegrating the total charge made by them for the carriage of goods.

The only further question is whether the law on this point has been altered by the Act of 1894. I think that it has not; but I do not desire to decide that point at present, because it has not been raised before us to-day, and I understand that it is likely to be raised in a case which will shortly come before us. But I think that the view I have expressed of s. 33, sub-s. 3, of the Act of 1888 is not inconsistent with the right or claim of a trader under s. 4 of the Act of 1894 to a rebate in respect of station accommodation or terminal services which have not been rendered to him, and of which he has, therefore, not had the benefit which other traders have had. The later section may entitle a trader in such a position to a rebate; but I do not now decide the question: I merely express the opinion that at present there does not appear to me to be any inconsistency between the two sections; the later section seems only to be another step in the direction of securing that perfect equality in the treatment of all traders which the Legislature has long aimed at. It may be that a charge for conveyance only, with other advantages thrown in and not specifically charged for, would not be sufficient to found a charge of undue preference; the sinister element necessary to an undue preference might be wanting in such a case.

There must, therefore, be an order upon the railway company to render an account; and I think that the order will be complied with if the railway company take the responsibility of formally asserting that no charge has been made by them except for conveyance.

SIR FREDERICK PEEL and VISCOUNT COBHAM concurred.

Order for an account.

Solicitors for New Union Mills Company: *Neish, Howell & Macfarlane.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1896
June 29.

In re THE COUNTY COUNCIL OF DERBYSHIRE AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DERBY.

Practice—Interrogatories—Pollution of Rivers—Proceedings in County Court—Whether Proceedings Civil or Criminal—Right of Complainant to Interrogate—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.

By s. 3 of the Rivers Pollution Prevention Act, 1876, every person who causes or knowingly permits sewage matter to flow into any stream shall be deemed to have committed an offence under the Act. By s. 10, a summary order may be obtained in the county court requiring any person to abstain from the commission of an offence against the Act, and any person making default in complying with such order shall pay to the person complaining such sum, not exceeding 50*l.* a day for every day during which he is in default, as the Court may order, and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court. Proceedings having been commenced in the county court for an order requiring the corporation of a borough to abstain from causing or permitting sewage to flow into a stream :—

Held (affirming the decision of the Queen's Bench Division), that the proceedings were not of a criminal or penal nature, and therefore that the complainants might interrogate the corporation.

APPEAL from a judgment of a Divisional Court reported ante, p. 53.

The county council of Derbyshire instituted proceedings in the county court against the corporation of Derby for the purpose of obtaining an order under s. 10 of the Rivers Pollution Prevention Act, 1876, requiring the corporation to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the River Derwent, any sewage matter.

On the application of the county council the county court judge made an order giving them leave to administer interrogatories for the examination of the defendants.

The corporation appealed, and the Divisional Court (Grantham and Collins JJ.) dismissed the appeal. (1)

(1) Ante p. 53.

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In re COUNTY COUNCIL OF DERBYSHIRE AND MAYOR, &c., OF DERBY.

Cozens-Hardy, Q.C., and *W. Graham*, in support of the appeal. The county council are not proceeding in respect of the infringement of any civil right, such, for instance, as riparian owners might have, but the proceeding is of a criminal or penal nature in which the Court will not allow interrogatories to the defendant. If this is not a proper description of the action, at all events it is an action which may render the corporation liable to penalties, and interrogatories will not be allowed: *United States of America* v. *McRae* (1); *Harrison* v. *Southcote* (2); *Hobbs* v. *Hudson*. (3)

Stanger, Q.C., and *T. G. Carver*, contra. A decision in this case in favour of the county council will not in itself render the corporation liable to penalties; but if they neglect to obey the order of the county court separate proceedings will be necessary for the enforcement of penalties. Further, the making of the order is discretionary, so that in no sense can it be said that penal consequences are involved in the discovery sought: *Kirkheaton District Local Board* v. *Ainley*. (4)

Cozens-Hardy, Q.C., in reply.

LORD ESHER M.R. I have had considerable doubt as to what our decision ought to be in this case; but in the result I do not see my way to dissent from the decision of the Queen's Bench Division. That this proceeding is not criminal is clear; but it is true that there may be a penal result following on it. At the present time there is no condition existing to which a penalty can be affixed. This application is equivalent to an application for a mandatory injunction, and assumes that there is sewage going through certain sewers into the river. When that application is made it is discretionary with the judge to grant it; and I cannot see anything to prevent the corporation, when the case is before the county court, from shewing if they can that it would be wrong to issue a mandatory injunction because they could not reasonably comply with it. At the present time there is nothing pending but this application for a mandatory injunction. It is said the granting this application may

(1) L. R. 3 Ch. 79.
(2) 1 Atk. 528, 539.
(3) 25 Q. B. D. 232.
(4) [1892] 2 Q. B. 274.

implicate the corporation in penal consequences ; but before that can happen something else must intervene. Suppose an order is made limiting the time during which the necessary works are to be completed, and at the end of the time limited the works are not done, it does not seem to me that that circumstance taken alone would call for a penalty. There would have to be an application to the judge to enforce the order made by him, and he would require to know why the order was not complied with. There is nothing to prevent the corporation, either when the county court judge is asked to make the order or when he is asked to enforce it, contending that it should not be made on the ground that it was impossible to comply with it, or that circumstances had arisen since the making of the order which rendered it impracticable to comply with it. They would say that it was unjust to impose a penalty upon them for default when they had done everything they could to obey the order. If the judge finds that they have not done all they could, or that there had been wilful default, he must impose such a penalty as he thinks right under the circumstances ; but the question of penalty does not arise till this further inquiry ; so that at present there is nothing in the nature of the case to prevent the county court judge from giving such discovery and allowing such interrogatories as he thinks fairly necessary.

A. L. Smith L.J. I think the decision of the Court below must be upheld.

The proceeding is taken by the county council of Derbyshire under the Rivers Pollution Prevention Act, 1876, ss. 3 and 10, and the Local Government Act, 1888, s. 14, which enables proceedings under the former Act to be taken by a county council. They are asking for what is, in effect, an injunction, as was pointed out in *Kirkheaton District Local Board* v. *Ainley* (1), to prevent the corporation of Derby from discharging their sewage into the river. The making of such an order is discretionary on the part of the county court judge. The evidence which it is sought to obtain by discovery is wanted for the purpose of maintaining the application for that injunction.

(1) [1892] 2 Q. B. 274.

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A. L. Smith L.J.

In opposition to the application for discovery, it is said first that this is a criminal cause or matter; but I am satisfied that it is not and that the point is a bad one.

Then it is said that, if not a criminal cause or matter, this is a proceeding in which a penalty may be obtained, and is within the well known rule that in such a proceeding no aid will be given by the Court in the way of discovery to assist in the recovery of the penalty. Mr. Cozens-Hardy cited Lord Hardwicke's judgment in *Harrison* v. *Southcote* (1), and laid stress upon the fact that Lord Hardwicke said that the rule was that if the defendant "may" be subject to a penalty the Court will not grant discovery; but Lord Hardwicke was dealing with a case in which, under the circumstances existing when the action was brought, the discovery if granted might subject the person called upon to make discovery to a penalty in the action. Did any one ever hear of such an objection being taken where discovery is wanted to support an application for an injunction, although disobedience to the injunction when granted might thereafter lay the defendant open to penal proceedings? It is ridiculous to suggest that a man can take advantage of his own wrong, that is, disobey the injunction, and then invoke the equitable doctrine as to not allowing discovery in penal actions. The same observation applies to *United States of America* v. *McRae*. (2)

In the case before us the evidence which is sought by the discovery can only be useful and profitable for the purpose of obtaining the injunction. Later on, if an order is made and the time limited for compliance has come and the order is disobeyed, this evidence will not again come before the county court judge on the application to enforce the order by the imposition of penalties. At that stage, if it ever arrives, the county council will have to bring up the order and shew by fresh evidence that the time limited has elapsed, and that default has been made in complying with the order. Such a case as the present seems to me to be clearly not within the rule as to the refusal of discovery where penal consequences

(1) 1 Atk. 528, at p. 539. (2) L. R. 3 Ch. 79.

may follow in the action, and I think discovery is permissible in this case, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for county council: *Wynne, Holme & Wynne, for N. J. Hughes-Hallett, Derby.*

Solicitors for corporation: *Satchell & Chapple, for H. F. Gadsby, Derby.*

A. M.

PAIN and Another *v.* BOWDEN.

1896
June 3, 8.

County Court—Costs—Administration Action—Discretion of Registrar over Taxation—Insolvency of Estate—County Court Rules, 1889, *Order* L. A, *r.* 20.

The costs of the administrator in an administration action in the county court are discretionary fees or allowances within the meaning of Order L. A, r. 20, of the County Court Rules, 1889. Upon the taxation of such costs the registrar may take into account the fact that the estate is insolvent, and may disallow items which would be allowed in the case of a solvent estate.

Per Wills J.: In such a case the administrator's right to costs should be confined to such costs as are necessary for the protection of the estate.

Appeal from an order of the judge of the Swansea County Court upon an application to review the taxation of a bill of costs by the registrar.

The action was a creditor's action for administration commenced in January, 1895, in the High Court, but transferred in April, 1895, to the county court.

In August, 1895, it was discovered that the estate was insolvent, and an order was made by the county court judge for taxation of the costs up to date. Upon the solicitor to the administratrix bringing in his bill of costs for taxation, the registrar, in taxing it as between solicitor and client, disallowed charges amounting to about 27*l.*, which were in the main charges for letters written by the solicitor to, and interviews held by him with, creditors of the estate for the purpose of getting them to agree to a settlement of their claims; he however allowed a sum of three guineas for letters at the end of the bill.

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The items were disallowed by the registrar upon the ground that a distinction ought to be made in the taxation of costs between cases where the estate was solvent and where it was known to be insolvent: they were items which would have been allowed in the case of a solvent estate. Upon application to the county court judge, he made an order for a review of the taxation upon the ground that no distinction existed between the taxation of costs of the administrator of a solvent and insolvent estate, and further that such costs were not discretionary within the meaning of Order L. A, r. 20, of the County Court Rules, 1889 (1), and that the registrar, therefore, had no discretion to disallow them on proof of their having been incurred.

One of the creditors appealed.

Gollan, for the appellant. These costs were discretionary allowances within the meaning of Order L. A, r. 20, of the County Court Rules. The case of *In re Chennell, Jones* v. *Chennell* (2), upon the supposed authority of which the county court judge acted, was a case in the High Court decided under the Rules of 1875, when there was no discretion as to the costs of administration actions; such costs are now discretionary by virtue of Order LXV., r. 1. The present case falls within the decision in *Plumb* v. *Craker* (3), where it was held that a county court judge had an absolute discretion over the costs of an administration action, and that he was not bound by the rule in equity which prevailed before the Judicature Acts, that the plaintiff in an administration suit, properly brought, was entitled to his costs out of the estate. As to the disallowances, many of them were in respect of work that the administratrix should have done

(1) By Order L. A, r. 20, of the County Court Rules, 1889, "All fees or allowances which are discretionary shall, unless otherwise provided, be allowed at the discretion of the registrar on taxation, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the action or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances."

(2) 8 Ch. D. 492.

(3) 16 Q. B. D. 40.

herself and not have employed a solicitor to do, and fall within the principle of the decision in *Harbin* v. *Darby*. (1) The registrar was entitled to make a distinction between the case of a solvent and an insolvent estate.

[He was stopped by the Court.]

Ashton Cross, for the administratrix, the respondent. The only point taken before the county court judge was that the registrar had no right to take into consideration the fact that the estate was insolvent. But the insolvency of the estate is no reason for putting a penalty on the administratrix, who would otherwise have been allowed these costs. In Williams on Executors, vol. ii. p. 1907, it is said that a creditor who sues on behalf of himself and all other the creditors is entitled, where the estate proves insufficient for payment of debts, to costs as between solicitor and client, and the administratrix should stand in no worse position. (2) In Seton on Decrees, vol. ii. p. 1233, dealing with the costs of administration actions where the assets are deficient, it is said that the costs of the executors as between solicitor and client are to be first provided for. In *In re Love, Hill* v. *Spurgeon* (3), a trustee was held to be entitled to costs as between solicitor and client in an administration action, where no case of misconduct was made out against him; the administratrix must have the same right. It is the general rule of practice in the Chancery Division to make no difference in the taxation of an administrator's costs in the case of a solvent and an insolvent estate.

Cur. adv. vult.

June 8. CAVE J. I am of opinion that this appeal from the order of the county court judge must be allowed, and the decision of the registrar restored. On reading the judgment of the learned county court judge it is obvious that he thought that the registrar had no discretion which he could exercise with regard to the taxation of these costs, and that upon proof that they had been actually incurred he was bound to allow them. I think that this view arose from a misunderstanding of the

(1) 28 Beav. 325.

(2) See *In re Richardson*, 14 Ch. D. 611.

(3) 29 Ch. D. 348.

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Cave J.

decision in *In re Chennell, Jones* v. *Chennell* (1), which decided that the costs of a trustee were not in the discretion of the Court in the same way as the costs of an ordinary plaintiff or defendant, and were therefore not in the absolute control of the judge; so that if they were disallowed by the Court an appeal would lie, though no appeal lies from a decision of the Court as to costs where they are wholly in the discretion of the Court. That has nothing to do with the registrar's discretion on taxation of costs, and it was never intended in *In re Chennell, Jones* v. *Chennell* (1), to lay down that, because certain costs were not in the discretion of the judge, therefore they should not be taxed at all. That would be sufficient to dispose of the present case; but there are expressions in the judgment of the county court judge upon which we are asked to support his judgment upon a different ground, namely, that the registrar in taxing the costs improperly made a distinction between the costs of administering solvent and insolvent estates. My brother Wills has consulted Stirling J., who reports that in the Chancery Division there is no such rule as that suggested, namely, that no distinction is made in taxation whether the estate is solvent or not. No authority has been produced for such a rule, and, as Stirling J. has pointed out, there are certain costs to which it could not properly apply. In the absence of any such rule, we must look to see what the taxation has been in the present case, and what has been its result. We asked the respondent's counsel to pick out the items which he alleged to have been wrongly taxed off, and to tell us the grounds for saying that the taxation was wrong; but after a short time he fell back on his original contention that the bill must be taxed again in accordance with the direction of the county court judge solely on the ground that no difference could be made between solvent and insolvent estates. We do not find that there is any such rule as is contended, and to send the bill of costs back to be taxed on that principle would afford no guidance to the registrar. In my judgment these amounts were very properly and rightly taxed off by the registrar, who struck off these individual charges for letters and interviews, and allowed a lump sum in

(1) 8 Ch. D. 492.

respect of them at the end of the bill. I can see nothing wrong in the course which he adopted; and therefore the order of the county court judge must be set aside.

WILLS J. I am of the same opinion. After the argument, I mentioned the case to Stirling J., who pointed out that it was absurd to say that there was no difference between the taxation of the administrator's costs in the case of solvent and insolvent estates; for instance, that in the case of solvent estates the administrator was always allowed the costs of an inquiry as to next of kin, while in the case of insolvent estates there would be no use in such an inquiry, as the next of kin could get nothing. Here we are dealing not merely with the practice of the Chancery Division, but also with a specific rule, which after mentioning specifically various matters as proper to be taken into account, adds "and all other circumstances." In this case it is most reasonable to take into account the fact that the estate was not sufficient to pay all the creditors; and in such a case the administrator's right to costs should be confined to such costs as are really necessary for the protection of the estate. It is within the competence of the registrar to take this circumstance into consideration and to give due weight to it. I think that the registrar acted upon a perfectly reasonable basis of taxation.

Appeal allowed.

Solicitors for creditors: *Easton & Cargill.*

Solicitors for administratrix: *Riddell, Vaisey & Co., for Viner, Leader & Co., Swansea.*

W. J. B.

C. A.

1896
June 25.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUSTICES OF KENT AND ANOTHER.

Licensing Acts—Licence—Appeal from Licensing Justices—Party to Appeal—Non-appearance at Sessions—Order as to Costs of Successful Appellant—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 5.

At a general annual licensing meeting a person objected to the renewal of a certain licence, with the result that the licence was refused. The licensed person appealed to the quarter sessions and obtained a renewal of his licence. On the hearing of the appeal the objector did not appear:—

Held (affirming the decision of the Queen's Bench Division), that the objector was a party to the appeal within the meaning of s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, notwithstanding that he did not appear to oppose it, and that the court of quarter sessions had jurisdiction to order him to pay the costs of the appeal.

Reg. v. *Justices of Gloucestershire* (68 L. T. (N.S.) 225) approved.

APPEAL from a judgment of a Divisional Court reported ante, p. 1.

A person named Boulter appeared at licensing sessions to oppose an application of one George Sharp for the renewal of a licence, which was refused. On appeal to quarter sessions the decision of the justices was reversed, and costs were granted against Boulter, who had been served with notice of the appeal, but had not appeared. A rule nisi was obtained for a certiorari to bring up the order as to costs to be quashed. The Divisional Court (Lord Russell of Killowen C.J. and Wright J.) discharged the rule. (1)

Boulter appealed.

Blaiklock, in support of the appeal.

Lawson Walton, Q.C., and *Bodkin* (*Dickens, Q.C.*, with them), contra.

LORD ESHER M.R. The only question in this case is whether an objector whose objection to the renewal of a licence has been sustained at the licensing sessions is a party

(1) Ante, p. 1.

to an appeal brought by the licensed person at quarter sessions, although he does not appear there to support the decision of the justices. The case of *Reg.* v. *Justices of Glamorganshire* (1), which is binding on us, shews that justices sitting in licensing sessions are a court of summary jurisdiction; and *Reg.* v. *Justices of Gloucestershire* (2), a decision with which, though it is not binding on us, I entirely agree, shews that, by making himself an objector at licensing sessions and obtaining a decision supporting his objection, a person makes himself a party to an appeal to quarter sessions brought by the publican the renewal of whose licence has been refused. That case decides that such an appeal could not be properly launched without service of the notice of appeal on the objector. This can only be because he is a party to the appeal. The notice to the justices, as pointed out by A. L. Smith L.J. in *Reg.* v. *Justices of London* (3), does not make them respondents and parties to the appeal against their will, though they may go to quarter sessions either in their character as justices or as litigant parties. In a case like the present the objector must be served with notice, and the proceedings on appeal are regulated as in other appeals from courts of summary jurisdiction. The objector is thus made respondent in the appeal, though he does not appear at quarter sessions to support the decision of the justices in licensing sessions. The Court has a discretion as to costs under which it can deal with the case where there are two or more objectors; so that no difficulty can arise in such a case.

I agree with the Court below that the court of quarter sessions had jurisdiction to order the objector to pay costs.

This appeal must be dismissed.

KAY L.J. This case comes before us on appeal from a judgment of the Divisional Court discharging a rule for a certiorari.

The ground of the rule for a certiorari was that the court of quarter sessions had no jurisdiction to make an order for costs against the prosecutor. The law is clearly laid down in *Reg.*

(1) [1892] 1 Q. B. 621. (2) 68 L. T. (N.S.) 225.
(3) [1895] 1 Q. B. 616.

C. A. 1896

THE QUEEN v. JUSTICES OF KENT.

Kay L.J.

v. *Justices of Glamorganshire* (1), that justices sitting in licensing sessions are a court of summary jurisdiction within the statutes relating to such courts, and that the procedure on appeals from courts of summary jurisdiction is applicable, including among such provisions the service of notice of appeal on the "other party" and the clerk of the court of summary jurisdiction under the Summary Jurisdiction Act, 1879, s. 31, sub-s. 2. It has been further decided in *Reg.* v. *Justices of Gloucestershire* (2), that if the objector at licensing sessions is not served with notice of appeal, that is fatal to the appeal. With this decision I agree—indeed, it appears to me to follow of necessity from the first-mentioned decision. If the objector is a party to the appeal, then, whether he appeared at the argument of the appeal or did not appear, the jurisdiction of the court of quarter sessions seems to me to be indubitable to order him, in the exercise of their discretion, to pay the costs of the successful appellant. The decision of the Divisional Court was right, and the appeal must be dismissed.

A. L. SMITH L.J. The Divisional Court has discharged a rule for a certiorari to bring up an order of quarter sessions as to costs, and in my opinion they were right in so doing.

In the first place, justices in licensing sessions are a court of summary jurisdiction. This may have been doubtful under the Summary Jurisdiction Act, 1879, standing alone, but the doubt was cleared up by the Summary Jurisdiction Act, 1884, s. 7, which enacts that the definition of a court of summary jurisdiction in the Act of 1879 includes justices or magistrates, "whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his or their commission, or by the common law"; and this definition is repeated in the Interpretation Act, 1889, s. 13, sub-s. 11. No one can doubt that this definition includes justices at licensing sessions, and it was so decided in *Reg.* v. *Justices of Glamorganshire.* (1)

Going back to the Summary Jurisdiction Act, 1879, s. 31, sub-s. 2, prescribes the procedure as to notice to be served on

(1) [1892] 1 Q. B. 621. (2) 68 L. T. (N.S.) 225.

the other party, and the clerk in the case of appeal from the decision of a court of summary jurisdiction. In the case of objection to the renewal of a licence, who is the "other party"? Obviously it is the objector who has succeeded in his objection and compelled the publican to go to quarter sessions to get a renewal of his licence, and who cannot launch his appeal without giving the objector notice. This was decided in *Reg.* v. *Justices of Gloucestershire* (1), and to my mind that decision is perfectly correct. The respondent on the appeal may or may not appear at the quarter sessions; but, having once objected, he cannot get out of his liability to pay the costs of the successful appellant under sub-s. 5 of the same section, if the court of quarter sessions think fit to make an order on him to do so.

I think the decision appealed from is right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for objector: *Hicks, Davis & Hunt.*
Solicitors for defendant Sharp: *Godden, Son & Holme.*

(1) 68 L. T. (N.S.) 225.

A. M.

1896
May 18.

DICKINS *v.* GILL.

Post Office — Die for making fictitious Stamp — Possession "without lawful Excuse"—Post Office (Protection) Act, 1884 (47 & 48 *Vict. c.* 76), *s.* 7 (*c*).

By s. 7 (*c*) of the Post Office (Protection) Act, 1884, "a person shall not make, or, unless he shews a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp."

The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage-stamp could be produced. The only purpose for which the die was ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement," illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper:—

Held, that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse within the meaning of the above section.

CASE stated by the chief metropolitan police magistrate.

The respondent appeared to answer an information of the appellant, charging him with having, between May 17 and June 8, 1895, had in his possession a die and instrument for making a fictitious stamp. The proceedings upon the information were for the recovery of the penalty of 20*l.* imposed by s. 7 of the Post Office (Protection) Act, 1884. (1)

(1) By 47 & 48 Vict. c. 76, s. 7, "A person shall not (*a*) make, knowingly utter, deal in or sell any fictitious stamp, or knowingly use for any postal purpose any fictitious stamp, or (*b*) have in his possession, unless he shews a lawful excuse, any fictitious stamp, or (*c*) make, or, unless he shews a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp.

"Any person who acts in contravention of this section shall be liable on summary conviction on a prosecution by order of the Commissioners of Inland Revenue to a fine not exceeding 20*l.*, subject to the like right of appeal as in the case of a penalty under the Acts relating to the excise.

"Any stamp, die, plate, instrument, or materials found in the possession of any person in contravention of this section, may be seized and shall be forfeited.

"For the purposes of this section 'fictitious stamp' means any facsimile or imitation or representation, whether on paper or otherwise, of any

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The respondent was a newspaper proprietor and printer, carrying on business at the offices of a newspaper known as *The Bazaar, The Exchange and Mart*. On June 8, 1895 (and previously), he had in his possession a die or instrument received by him from one Van Hoytema, who had received it from the continent of Europe; the respondent had ordered the die to be made for him for use in illustrating the "Philatelist's Supplement" of *The Bazaar, The Exchange and Mart* newspaper, and it had been made and delivered accordingly. With the said die or instrument imitations or representations of a 2½*d*. Cape of Good Hope current postage-stamp could be produced, and an original and two such imitations or representations printed in colour by way of test by Messrs. de la Rue & Co. were made exhibits to the case: it was sworn that such impressions were a very fair imitation of the genuine stamps. It was, however, proved to the satisfaction of the magistrate or admitted that the only purpose for which the respondent had ordered and had in his possession the said die was for making upon the pages of an illustrated stamp catalogue, or newspaper, illustrations in black and white and not in colours of the Cape of Good Hope stamp in question; that such illustrations were intended to appear thereon together with illustrations of other stamps, and that such catalogues were intended for sale only to stamp-collectors and others, and as part of a newspaper published for the instruction and amusement of readers and buyers of the paper.

It was contended on behalf of the appellant that the possession of the die or instrument without licence or authority from the Crown was a contravention of the statute, and that the purpose for which the respondent had the die in his possession did not constitute a lawful excuse within the meaning of the statute. It was contended on behalf of the respondent that, inasmuch as it had been proved or admitted that the die was used only and intended to be used only for the purposes aforesaid, the respondent had shewn a lawful excuse for its possession.

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stamp for denoting any rate of postage, including any stamp for denoting a rate of postage of any of Her Majesty's colonies, or of any foreign country."

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The learned magistrate found—

(A) That the respondent had in his possession a die or instrument capable of making a fictitious stamp.

(B) That there were facts which shewed absolute bona fides in the respondent, and that there was a certainty that the respondent would not use the die for any improper purpose. He thought that this was evidence of a lawful excuse, and found as a fact that there was a lawful excuse, and dismissed the information.

The question for the Court was whether it appeared on the evidence as a matter of law that there was no lawful excuse, and that consequently the learned magistrate was not entitled to find as a fact that there was a lawful excuse.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), (*Danckwerts* with him), for the appellant. The decision is wrong: it in effect changes the language of the section, and makes the expression "without lawful excuse" equivalent to "with guilty knowledge." The section amounts to an absolute prohibition against making a fictitious stamp in this country, and against having a fictitious stamp, wherever made, in one's possession in this country without lawful excuse. The Legislature contemplated the cases of a stamp being made abroad and subsequently found in a person's possession here, and of its being in his possession here without there being any evidence to shew that it was made by or for him. The words "without lawful excuse" cover such cases as those of a magistrate, constable, or custom-house officer who might lawfully come into possession of a fictitious stamp in the course of his duty.

C. W. Mathews, for the respondent. The decision is on a question of fact, and no question of law is involved in the appeal. Assuming, however, that the learned magistrate's decision involves a question of law, it was right. The expression "lawful excuse" cannot be limited in its meaning to the authority of the Crown. "Authority" and "excuse" are different words, having different meanings attached to them in this very Act: s. 6 prohibits the making of imitations of post-office stamps, &c., "without due authority," which obviously

means authority given by the Crown; while s. 7 uses the words "without lawful excuse," which have a wider signification. Admitting that s. 7 amounts to an absolute prohibition against the making of a fictitious stamp or die, nevertheless, under sub-s. (*a*), dealing in or using a fictitious stamp is only an offence if done "knowingly," while under (*b*) and (*c*) a man may not have in his possession a fictitious stamp or a die for making it "unless he shews a lawful excuse." This cannot mean that the possessor of a fictitious stamp is to be left absolutely defenceless, and that he must be convicted unless he produces the authority of the Crown for its possession. If the appellant's contention is correct, any stamp-collector who, however innocently, has the misfortune to come into possession of a fictitious stamp, must necessarily be convicted under this section on proceedings being taken against him. The section means that if a person is in the innocent or unconscious possession of a fictitious stamp or die he has a good defence; and innocent possession by the respondent is what is found in the case. In several statutes a distinction is drawn between authority and excuse, the latter being the wider and less rigid term. Under 2 & 3 Will. 4, c. 34, s. 10, "lawful authority" is required for the making of coining tools, while "lawful excuse" is an answer to a charge of being in possession of them; under 11 Geo. 4 and 1 Will. 4, c. 66, s. 19, there is the same distinction drawn between the making of foreign bank-notes, &c., without authority, and their possession without lawful excuse; while by 24 & 25 Vict. c. 99, s. 24, and 33 & 34 Vict. c. 58, s. 5, the expression "without lawful authority or excuse" applies both to the making and possession of coining tools and plates for stock certificates respectively. That possession "without lawful excuse" does not mean innocent possession appears from s. 13, sub-s. 9, of the Stamp Duties Management Act, 1891, which makes it felony if a person "knowingly and without lawful excuse" has in his possession a forged die or stamp. If the appellant is right, a man who bought a stamp as genuine and discovered subsequently that it was fictitious would be liable under that section to be convicted of felony.

[COLLINS J. In that case would there not be a difference in

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his position before and after he discovered that the stamp was fictitious?]

That only shews that the "excuse" contemplated by the statute is made up of facts which shew an innocent possession; it must be wider than "authority," for a man cannot ask for an authority to possess that which he does not know he is in possession of.

The Solicitor-General, in reply. In *Reg.* v. *Harvey* (1) Willes J. said, "Excuse is either an authority or a reasonable belief in authority"; following out that definition, it would be sufficient excuse if a man bonâ fide believed in a state of facts which, if it existed, would render his possession lawful. But in the present case the respondent had had the die made for him, which in itself was an offence, and he could not have had a reasonable belief that he was authorized to have in his possession that which it was an offence to make at all.

GRANTHAM J. In my opinion the appellant is entitled to our judgment. The case is no doubt one of considerable importance and deserving of careful argument; but I have been unable to alter the conclusion which I arrived at early in the proceedings, that the learned magistrate mistook the meaning of the words "lawful excuse" in arriving at his determination. Practically what he has done amounts to saying that in his judgment the fact that the respondent believed that he was not doing wrong amounted to a lawful excuse within the meaning of the section. I cannot think that that can be so, or that belief that a person is not doing wrong when in fact he is doing wrong can afford him a lawful excuse. What is it that the Legislature has said is not to be done? A person is not to make a die from which a fictitious stamp may be made: it is absolutely forbidden, and a person acting in contravention of the prohibition is liable to a penalty. In that case the man could not rely on his belief that he was not doing wrong, for, the thing being absolutely prohibited, he must admit that he knew he was doing wrong. Assuming, for the sake of argument, that the respondent believed that, if he could only get the die, he was not doing

(1) L. R. 1 C. C. 284, at p. 286.

any wrong in the use he intended to make of it, still in order to get it he was bound to do that which was wrong. Knowing that the die could not be made in this country, and with the idea of evading the very penalties that he would be liable to under this Act if he had it made here, he had it made abroad. I think that the respondent committed an offence under that part of the section, and that he could have been made liable to a penalty under it; he was, in my judgment, acting illegally in having the die made. However that may be, it seems to me that it would be very difficult to shew innocence after the die so obtained is once in his possession. He had it in his possession for the purpose of shewing to the purchasers of his paper what the stamp was like, and for that purpose he made an actual representation of what the stamp was. It is true that all the colouring was not put in, but that can be done without difficulty, and the respondent therefore has in his possession a die which can be used for the purpose of making a fictitious stamp. That is admitted. Is it a lawful excuse that he wanted to shew people what the original stamp was? I think not, for it was wrong for him to have the die in his possession at all.

The respondent's counsel contended that it was quite possible that the respondent's possession might not be illegal, because in some statutes there are the words "without authority," and therefore authority could be given for having a die; and then he endeavoured to shew that, the word "authority" being omitted in this sub-section and the word "excuse" being put in, what he chooses to call an innocent motive must be an excuse. I confess to being unable to follow the argument very closely, especially as in the present case no "authority" for making the die had been, or perhaps could be, given. I do not stay to answer the difficulty, apparent on the face of it, that Mr. De la Rue might have felt when told to make the stamp for the purposes of this case; but it is evident that the authorities were so determined that dies should not be made that they did not, in framing the Act, give their sanction to the view that dies could be made "with the authority" of the Crown; and they certainly gave no authority for making this particular die. Although, however, a person might have no authority for

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Grantham J.

making, and would be liable to a penalty for making, a die or stamp, yet I can well imagine many cases in which it would be very hard for persons to be punished for being in possession of that which they did not know to be illegal. For instance, if a person ignorantly bought a fictitious stamp, it would be hard that he should be punished and made liable to a fine because his knowledge was not sufficient to enable him to know whether it was good or bad; and that, I think, would be a lawful excuse. Why? Not because the man believed that he had authority to have it, for he could not believe that he had authority to have a fictitious stamp in his possession simply because he had been taken in in the purchase of it; he might, however, say that he wished to excuse himself for having the stamp because he did not believe that it was fictitious, but believed it to be genuine: that seems to me to be an excuse in law, and, therefore, would be a "lawful excuse." But in a case like the present, when a man has a die made abroad because he knows he cannot have it made here, how can he have a lawful excuse for its subsequent possession? Looking at the language of s. 7 of the Act of 1884, which absolutely prohibits the making of a die or a fictitious stamp, and omits all suggestion of "lawful authority" for such making, I think that the words "lawful excuse" must be construed more strictly than they would be if the section had contemplated a lawful authority for the making. In my opinion, therefore, this appeal must be allowed.

COLLINS J. I am of the same opinion. I think that the act of the respondent was clearly within the mischief struck at by the statute. It is obvious that the purpose of the Act is in every way to make it illegitimate for persons to do that which by the policy of the law can only be done by, or with the authority of, the Crown; the section therefore deals with as many possible ways of interfering with the monopoly of the Crown as occurred to the draftsman of the Act. It begins by saying, "A person shall not make"—that is an absolute prohibition against making; then it introduces the word "knowingly" with respect to uttering, because that is something that

might be done quite innocently; it is therefore necessary to introduce the word "knowingly" in that case, whereas it is not necessary in the case of "making," which in itself involves a conscious act on the part of the person who does it. Then come the words "knowingly utter, deal in or sell any fictitious stamp, or knowingly use for any postal purpose any fictitious stamp." Those are conscious acts. Then comes sub-s. (*b*), which runs "have in his possession, unless he shews a lawful excuse, any fictitious stamp." It seems to me that there, again, that must be a conscious act, and that what is struck at is a person having a fictitious stamp consciously in his possession, and therefore being obliged to defend that possession by making an excuse. In my judgment, it is unnecessary to deal with the very refined and ingenious argument for the respondent on this point, because as a practical matter I think it would be impossible to divide the innocent from the culpable part of the act of a person who is challenged with being in possession of a fictitious stamp. It would not be ad rem for him to say, "I can explain how I came to get possession of it," unless he was prepared to defend the retaining possession of it; and the moment the Legislature or the proper authority had intervened, he would be called upon to hand it back under the later paragraph of the section, which provides that "any die, plate, instrument, or materials found in the possession of any person in contravention of this section, may be seized and shall be forfeited." Therefore, even if he came by it unconsciously, his attention would be drawn to the fact that he was in possession of it; and then, if he could not give a lawful excuse, I think he would have to give it up; and I do not think the fact that he got it unconsciously could be considered a "lawful excuse" for his retaining it after the proper authority had intervened.

Then we come to paragraph (*c*), under which this charge is made, and it is open to the same observations that I have already made. It runs, "make, or, unless he shews a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp." What we are dealing with in the present case is undoubtedly on the facts a

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conscious possession of a die for making a fictitious stamp. Now, it would be very difficult, I should think almost impossible, to suppose a case of a person unconsciously getting possession of a die for making a fictitious stamp. A die he might get hold of, but a die for making a fictitious stamp it is almost impossible to suppose anybody could get possession of without knowing that it was for making a fictitious stamp; if it is not for making a fictitious stamp, the offence is not committed. But even supposing a person could, as was suggested during the argument, buy a die for making a fictitious stamp without knowing that he was doing so—it is very difficult to suppose it, for his object in getting it would be to enable him to complete his collection, and therefore it could be of no use to him unless it was a die for the purpose of making a fictitious stamp—but supposing he could get it into his possession innocently, then comes the moment when the executive ask him to give it up; and then, if not before, it seems to me that he is acting in contravention of the section if he claims to keep it without making a "lawful excuse." What is the excuse averred here? It is that the respondent wanted it for his own purposes, in order to print fac-similes, not in colours, in his paper. It seems to me that that is not a "lawful excuse"; it may be a proper motive on his part, but it is not one that the Act can tolerate, and it would certainly be within the mischief of the Act. If any person, whether a stamp-collector or not, were at liberty to import dies for the purpose of making fictitious stamps simply for the purpose of curiosity or antiquarian interest, it is obvious that the mischief of the Act would arise, even if such a proceeding were not in contravention of the law. Therefore I entirely concur in the views of my learned brother, and agree that the appeal must be allowed.

Judgment for the appellant.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Powell & Skues.*

W. J B.

[IN THE COURT OF APPEAL.]

C. A.
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July 14.

THE QUEEN *v.* VESTRY OF ST. MATTHEW, BETHNAL GREEN.

Metropolis—Management Acts—Sewer—Drain—Liability to Repair—Sewer made without Approval of Metropolitan Board of Works or of Vestry—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 68, 69, 250—*Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 47, 48, 61.

The fact that the requisite sanction for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolis Management Acts, and as such vested in the vestry and repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe for the purpose of carrying off the drainage from them, which he connected with a sewer belonging to the vestry in a neighbouring street. No order for this work was given by the vestry, nor was the same sanctioned or approved of by the vestry or the Metropolitan Board of Works :—

Held (affirming the judgment of a Divisional Court), that the pipe so laid was a sewer within the meaning of s. 250 of the Metropolis Management Act, 1855, and was consequently vested in the vestry and repairable by them.

APPEAL from an order of a Divisional Court (the Lord Chief Justice and Wright J.), making absolute a rule for a mandamus directing the vestry of St. Matthew, Bethnal Green, to repair a sewer. (1)

In July, 1894, the School Board for London acquired certain lands in Tyrell Street, in the parish of St. Matthew, Bethnal Green. At that time there were a number of houses on the land, the sewage from which was carried off by a pipe running under the land parallel to Tyrell Street, and connected with a sewer belonging to the vestry in a neighbouring street. This pipe appeared to have been laid down by the owner of the houses in 1866; but there was no record or evidence, documentary or otherwise, that any order was obtained from the vestry for laying it down, or that the doing of the work had

(1) Ante, p. 95.

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been sanctioned by the vestry or the Metropolitan Board of Works. The school board pulled down the houses and erected new premises on the land, which they proposed to connect with the before-mentioned pipe. Finding that the pipe was defective, they called upon the vestry to remedy the defect and repair the pipe. The vestry declined to do so on the ground that the pipe was not a sewer vested in or repairable by them. The school board then obtained a rule nisi for a mandamus to the vestry which was subsequently made absolute by the Divisional Court.

Sir E. Clarke, Q.C., and *Jelf, Q.C.* (*Beven* with them), for the vestry. The question is whether this pipe is a "drain" or a "sewer" within the meaning of s. 250 of the Metropolis Management Act, 1855. It is contended that the proper inference is that it was laid as a drain for draining a block of houses by a combined operation under an order of the vestry under s. 74 of the Metropolis Management Act, 1855. Such an order of the vestry need not be express or in writing, and approval by the vestry would be equivalent to an order: see *Bateman* v. *Poplar District Board of Works*. (1) This drain having existed for thirty years, the Court should infer, if possible, a lawful origin for it rather than an unlawful one. The only way in which that can be done is by inferring the existence of such an order of the vestry for the making of it as a drain as has been mentioned. The making of it as a sewer was clearly unlawful.

By the proviso to s. 69 of the Metropolis Management Act, 1855, no new sewer can be made without the previous approval of the Metropolitan Board of Works. By s. 44 of the Metropolis Management Amendment Act, 1862, owners or occupiers of land are empowered to make sewers with the consent and subject to the conditions thereinafter mentioned. By s. 47 of the Act a private person intending to make a sewer communicating with a sewer vested in the Metropolitan Board of Works, or with a sewer vested in any vestry or district board, must submit plans and apply for the sanction of the vestry or district board, which must be in writing; and by s. 48, before giving such sanction, the vestry or district board must obtain the

(1) 33 Ch. D. 360.

approval in writing of the Metropolitan Board of Works. See also s. 61 of the Metropolis Management Amendment Act, 1862. There is no record or evidence of any sort, documentary or otherwise, of the fulfilment of the conditions required by these sections, or of any sanction by the vestry or approval by the Metropolitan Board of Works of the laying of this pipe as a sewer; and it would be a strong thing to infer the existence of such sanction or approval, which must be in writing, without any evidence. It cannot have been intended that a sewer which is unlawfully made by a private person should vest in the vestry under s. 68 of the Metropolis Management Act, 1855, and the expense of repairing it be thrown on the ratepayers. In *Kershaw* v. *Taylor* (1) the attention of the Court was not called to this point, and the case is therefore no authority upon it. The Court is asked to presume that this pipe was lawfully laid as a drain under an order of the vestry, the effect of assuming it to have been laid as a sewer being to relieve the person who unlawfully laid it from the charge of maintaining it, and to throw that charge on the public.

[They also cited Metropolis Management Amendment Act, 1862, s. 112.]

R. Cunningham Glen, for the school board. There is no evidence of any order by the vestry for the laying of this pipe as a drain. It is primâ facie a sewer, because it takes the drainage of more than one house. That being so, the onus of shewing that it is a drain lies on the vestry, as is shewn by *Bateman* v. *Poplar District Board of Works*. (2) The case is really concluded by the decision of this Court in *Kershaw* v. *Taylor*. (1) The proviso in s. 69 of the Metropolis Management Act, 1855, which has been relied upon, only applies to the substantive enactment in the preceding portion of the section, namely, that sewers shall be made by the vestry or district board themselves for effectually draining their parish or district. It does not apply to the making of sewers by private owners. Sect. 68 provides that all sewers made or to be made in the parish or district, with the exception of sewers and works vested or to be vested in the Metropolitan Board of Works as

(1) [1895] 2 Q. B. 471. (2) 33 Ch. D. 360.

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thereinafter mentioned, shall be vested in the vestry or district board respectively. There is no limitation with reference to the question whether a sewer was originally lawfully made or not.

Sir E. Clarke, Q.C., in reply.

LORD ESHER M.R. This case raises a question of fact as well as one of law. The first question is what inference we ought to draw from the facts we know with regard to this contrivance, as I will call it for the sake of using a neutral term, for carrying off the sewage of these houses. I do not think that, when they are looked at, they afford much room for the argument that we ought to assume that the person who laid it down did it lawfully rather than that he did it unlawfully. It appears to me that to make such an assumption would be contrary to the truth of the matter. I should say that it was more probable that the person who laid it down did it unlawfully than that he did it lawfully. So far as I am concerned, I have no doubt that in truth he made this contrivance for carrying off the sewage from these houses without asking the leave or getting the approval of anybody. That being the inference of fact to be drawn, a question of law arises which depends upon the construction of the provisions of the Metropolis Management Acts to which we have been referred. The first provision to which we must look to determine whether this contrivance is a "drain" or a "sewer" is the 250th section of the Metropolis Management Act, 1855. By that section it is provided that the word "drain" shall mean and include "any drain of and used for the drainage of one building only, or premises within the same curtilage," and shall also include "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and that the word "sewer" shall mean and include "sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." Therefore, if this pipe, being a contrivance for the removal of sewage, is not a drain within the meaning of the section, it must be a sewer. It is not possible that it should be neither the one nor the other. It

was made for the drainage of more than one house, and therefore primâ facie does not come within the definition of a drain. But it is said that it comes within that definition as being a drain for draining a block of houses by a combined operation under an order of the vestry. But that, again, depends on the question of fact whether there was such an order. No minute or other evidence, documentary or otherwise, of the existence of such an order is forthcoming; and, if there had been one, I think there must have been such evidence. In my opinion, to say that there was such an order would be saying something that one knows to be contrary to the truth. This, being a contrivance for dealing with the sewage of more than one house, could only be a drain if it were made under an order of the vestry; and, if not so made, it must be a sewer. By s. 47 of the Metropolis Management Amendment Act, 1862, every person other than a vestry or district board intending to make such a sewer must submit a plan of it to, and obtain the sanction of, the vestry or district board. It is clear to me, as I have said, that, as a matter of fact, in this case no such sanction was obtained. If it had been, there would surely have been some record of it in the proceedings of the vestry. Therefore, whoever made this sewer made it in contravention of s. 47, and in so doing did what was wrong. But he nevertheless did it, and made what according to the definition in s. 250 is a sewer. The Divisional Court were of opinion, and I agree with their conclusion, that from the circumstances stated in the affidavits and from the nature of the case it ought to be inferred that the vestry knew and did not disapprove of the making of the sewer, although there was nothing to shew that it was made by their order. I think the vestry or their surveyor must have known that these houses were drained by some means, and that there was a connection with their own sewer. Therefore, although this sewer was made in contravention of s. 47, the vestry knew of and have taken no objection to its existence, and it has continued in existence for thirty years. Under such circumstances the question arises whether or not it is vested in the vestry and repairable by them under ss. 68 and 69 of the Metropolis Management Act, 1855. By s. 68, "All sewers made or to be

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made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works as hereinafter mentioned, shall be vested in such vestry and board respectively." In this case that which is a "sewer" within the definition given by the Act has been made, and has existed for thirty years without objection by the vestry. The words of s. 68 with regard to the vesting of sewers in the vestry are absolutely comprehensive, and there are no words making any exception with regard to sewers which were wrongfully made originally. I think it would be very mischievous to hold that such a sewer as this did not vest in the vestry, for the result would be that there might be sewers in existence dealing with the sewage of perhaps many houses over which the vestry would not have the control, and in respect of which they would not be responsible, because they were originally made wrongfully. For these reasons, I think the judgment of the Divisional Court was right, and the appeal should be dismissed.

A. L. SMITH L.J. I am of the same opinion. I do not see any way in this case of getting out of the terms of the definition given in s. 250 of the Metropolis Management Act, 1855. The application is for a mandamus directing the vestry to maintain and repair a sewer. The answer made to that application is that the thing in question is not a sewer, but a drain. Primâ facie, as it takes the sewage of more than one house, it is a "sewer" within the definition given by the section, as was laid down in *Vestry of St. Martin* v. *Bird* (1) and *Kershaw* v. *Taylor*. (2) But the vestry allege that it nevertheless comes within the definition of a drain given in the section, as being a drain for draining a block of houses by a combined operation under an order of the vestry. The answer made by the applicants is that there is no such order. It lies on the vestry, in my opinion, to make out that there was such an order, because according to the definition this is primâ facie a sewer. It is argued that we ought to infer the existence of such an order; but I do not think so. I think that, there being no

(1) [1895] 1 Q. B. 428. (2) [1895] 2 Q. B. 471.

evidence of such an order, it is far more likely that the builder put down this pipe without getting any order of the vestry than that he went through the formalities that would be necessary for the purpose of obtaining an order. The question of law then arises as to the effect of ss. 68 and 69. With regard to that question, the vestry say that this case is differentiated from *Kershaw* v. *Taylor* (1) because in that case the attention of the Court was not called to the proviso in s. 69 of the Metropolis Management Act, 1855, to which I will presently allude. I do not agree with that contention. Sect. 68 provides that "all sewers made or to be made in any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works as hereinafter mentioned, shall be vested in such vestry and board respectively." There is nothing to confine that provision to sewers made by the vestry. It includes any sewer made or thereafter to be made, whether by the vestry or any other person. If the Act stopped there, I think that, where the vestry do not choose to look after a builder's operations and prevent him from making a sewer unlawfully, and he has made that which is a sewer according to the definition in the Act, and which has existed for thirty years, there is no reason why that sewer should not vest in the vestry. Then s. 69 provides that the vestry shall repair and maintain the sewers vested in them under the Act. It further provides that they shall cause to be made, repaired, and maintained such sewers or works as may be necessary for effectually draining their parish or district; and then comes the proviso that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. I am disposed to think that this section is there dealing with sewers made by the vestry or district board itself, and that the proviso applies to such sewers, and not to sewers to be made by outside persons. If so, of course that proviso could not be made a ground for differentiating this case from *Kershaw* v. *Taylor* (1); but as I have said, s. 68 vests all sewers by whomsoever made in the vestry or district board with the exception of sewers vested in the Metropolitan Board of Works; and it appears to me that

(1) [1895] 2 Q. B. 471.

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this applies to all sewers whether they may have been lawfully constructed or not. That being so, I do not see how the terms of the definition clause can be got out of; and it appears to me that, this being de facto a sewer within those terms, as taking the sewage of more than one house, and not being a drain for draining a block of houses by a combined operation under an order of the vestry, it must be vested in the vestry under s. 68, and is consequently repairable by them under s. 69.

Appeal dismissed.

Solicitor for school board: *C. E. Mortimer.*
Solicitor for vestry: *R. Voss.*

E. L.

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July 10, 13, 14.

NOBEL'S EXPLOSIVES COMPANY *v.* JENKINS AND COMPANY.

Ship—Bill of Lading—Excepted Perils—Restraint of Princes—Contraband of War—Risk of Seizure—Contract of Carriage Partly Performed—Justification of Refusal to Complete.

The plaintiffs shipped goods which were contraband of war on the defendants' ship for carriage from London to Yokohama under a bill of lading containing the exception of "restraint of princes," and also a special clause that "if the entering of or discharging in the port (of discharge) shall be considered by the master unsafe by reason of war . . . . the master may land the goods at the nearest safe and convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, and on the day of her arrival there war was declared between China and Japan. There were at that time several Chinese war-vessels in and round the port of Hong Kong, and if the master had attempted to sail thence with the plaintiffs' goods on board there would have been a serious danger of their being seized and confiscated. The master accordingly landed them there. In an action for breach of contract to carry the goods to Yokohama:—

Held, (1.) that the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception; (2.) that such risk of seizure, on the voyage between Hong Kong and Yokohama, rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3.) that the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing the plaintiffs' goods where he did.

ACTION tried before Mathew J. without a jury.

In June, 1894, the plaintiffs, who are manufacturers of

dynamite and other explosives, shipped on board the defendants' ship the *Denbighshire*, then loading in the port of London and bound for Yokohama, a large quantity of dynamite under a bill of lading by which it was to be delivered "at Yokohama or so near thereunto as she may safely get." The bill of lading contained the usual exception of "restraint of princes rulers and people," and also the following special clause: "In case of the blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods." The *Denbighshire* sailed with the plaintiffs' dynamite and other cargo belonging to other shippers on board. She called at Hong Kong on August 1, and, in obedience to the regulations of that port with respect to ships carrying explosives, she anchored off the Government magazines and flew a red flag, thereby publicly announcing the fact that she had contraband of war on board. On the same day war was declared between China and Japan. The master of the *Denbighshire* immediately cabled to the defendants for instructions; and on August 2 the defendants cabled in reply that the plaintiffs' dynamite must be discharged. The dynamite was accordingly landed at the Government magazines at Hong Kong; and on August 4 the ship sailed with the rest of the cargo for Yokohama, where she arrived in due course without molestation. In December the plaintiffs forwarded the dynamite by another steamer from Hong Kong to Japan. They then brought this action to recover from the defendants the amount of the freight which they had to pay for so forwarding the dynamite from Hong Kong, and other expenses they were put to in connection with the landing and reshipping at Hong Kong.

Joseph Walton, Q.C., and *H. F. Boyd*, for the plaintiffs. The breaking out of war did not excuse the defendants from the performance of their contract to deliver the dynamite at Yokohama. There is nothing illegal in a neutral ship carrying contraband of war to the port of a belligerent State: *Ex parte*

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Chavasse, In re Grazebrook. (1) The only result of so doing is that the goods are exposed to the risk of seizure and confiscation. If the owner of the goods chooses to run that risk he is entitled to require the shipowner to carry them to their destination. The defendants ought to have consulted the plaintiffs' wishes in the matter, which they did not do; and the plaintiffs, immediately on their being informed of the landing of the goods, protested against that course. The defendants cannot rely on the exception of "restraint of princes": there must be an "actual and operative restraint, and not a merely expected and contingent one": *Atkinson* v. *Ritchie.* (2) A mere apprehension of danger is not enough. It may be that apprehension of seizure will justify delay in delivery of the goods: *The Teutonia* (3); *The San Roman* (4); but it cannot entitle the shipowner to put an end to the contract altogether. He ought to wait till the danger is past, and then carry the goods to their destination. Nor can the defendants rely upon the special clause empowering them to land the goods if the entering of the port of discharge is unsafe. Yokohama was a perfectly safe port to enter, for the seat of war was never within a thousand miles of it. The clause cannot apply to a danger, existing possibly on the other side of the globe, which merely threatens to prevent the ship from getting to the port of discharge.

Lawson Walton, Q.C., and *Lewis Noad*, for the defendants. The contract of the defendants was to carry the goods to Yokohama, or so near thereunto as she could safely get. Under the circumstances Hong Kong was as near to Yokohama as the ship could safely get with the plaintiffs' goods on board. But even if the defendants' construction of that clause is wrong, they were excused by the exception of "restraint of princes." The cases of *Geipel* v. *Smith* (5) and *Rodoconachi* v. *Elliott* (6) shew that the meaning of the term "restraint" is not confined to an actual physical restraint, but includes a restraint arising from a reasonable apprehension of danger. Those cases also shew that where there is such a restraint, and it is likely

(1) 34 L. J. (Bk.) 17.
(2) 10 East, 530, at p. 534.
(3) L. R. 4 P. C. 171.
(4) L. R. 5 P. C. 301.
(5) L. R. 7 Q. B. 404.
(6) L. R. 9 C. P. 518.

to continue for an indefinite time, the shipowner is not only entitled to delay the performance of his contract, but may abandon it altogether on the ground that the further prosecution of the voyage after a long period of delay would in substance be the performance of a wholly different contract from that which the parties entered into. It would be a different voyage from that which they originally contemplated: *Jackson* v. *Union Marine Insurance Co.* (1) Further, the defendants were entitled, under the special clause in the bill of lading, to land the goods at Hong Kong, for the entering of the port of Yokohama was unsafe. That clause is not confined to insecurity existing in the immediate vicinity of the port of discharge: it applies whenever the ship enters a cordon of danger surrounding the port of discharge, however wide that cordon may be.

Joseph Walton, Q.C., in reply. The cases of *Geipel* v. *Smith* (2) and *Jackson* v. *Union Marine Insurance Co.* (1) are no authorities for the proposition that the shipowner in such a case as the present may abandon his contract altogether. In those cases the contracts were still executory: the ships had not begun to load. Here the ship had loaded, and the voyage was partly performed. In *Dahl* v. *Nelson, Donkin & Co.* (3) Lord Blackburn laid stress upon that distinction, and expressed the opinion that the doctrine of those cases did not apply where the contract was not executory. As to the contention that the defendants satisfied their contract by the ship landing the goods as near to Yokohama as she could safely get, it is an answer that the ship did get safely to Yokohama.

MATHEW J. This was an action to recover damages for the non-delivery at Yokohama of explosives, admitted to be contraband of war, after war had been declared between China and Japan. The goods were shipped by the defendants' steamer the *Denbighshire*, under a bill of lading by which the goods were to be delivered "at Yokohama or so near thereunto as she may safely get." The bill of lading contained the usual exception of "restraint of princes rulers or people," and also a special clause to which I will refer presently.

(1) L. R. 10 C. P. 125. (2) L. R. 7 Q. B. 404. (3) 6 App. Cas. 38, at p. 53.

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Mathew J.

The steamer arrived in the course of her voyage at Hong Kong on August 1, 1894, when war had been declared. By the regulations of the port of Hong Kong the vessel, having explosives on board, was anchored off the government magazines at Hong Kong and was compelled to fly a red flag. There were in the port numerous revenue cruisers of the Chinese Government, and within sight from where she lay were two Chinese war-vessels. Hong Kong is near the naval station of the Southern China squadron, and there were other war-vessels about the port. The fact that the *Denbighshire* had explosives on board was generally known. The captain, in the reasonable and well founded belief that his vessel if she sailed with the plaintiffs' goods on board would be stopped and the goods confiscated, telegraphed to his owners for advice, and received from them a reply directing him to land the goods. The defendants at once informed the plaintiffs, who protested against the course proposed to be taken on the ground, as it was contended, that the goods were not contraband of war. The goods were discharged and placed in safe custody, and the vessel proceeded on her voyage on August 4 and arrived safely at Yokohama. For the defendants, reliance was placed on the bill of lading that the steamer should proceed to "Yokohama or as near thereunto as she could safely get." It was argued that at Hong Kong she was as near as she could safely get to Yokohama within the meaning of the bill of lading. But the contract was not to carry to the nearest place to which the goods could safely get, but to deliver the goods at Yokohama, or as near thereto as the vessel could safely get. The vessel did get to Yokohama, and the obligation to deliver the goods under the clause in question thereupon became complete. This ground of defence seems to me untenable.

The main ground of defence was the exception in the bill of lading of "restraint of princes rulers or people." A large body of evidence was laid before me to shew that if the vessel sailed with the goods on board she would in all probability be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I

am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith* (1) and *Rodoconachi* v. *Elliott*. (2) The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The war-ships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception.

There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows: "If the entering of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods." It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to

(1) L. R. 7 Q. B. 404. (2) L. R. 9 C. P. 518.

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Mathew J.

limit his discretion to the case where the information reached him on his arrival off the port of destination.

But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes J. in *Notara* v. *Henderson* (1), "a fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account." I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo.

Judgment for defendants.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) L. R. 7 Q. B. 225, at p. 237.

J. F. C.

DIXON *v.* GREAT WESTERN RAILWAY COMPANY.

1896
July 15.

Railway—Accommodation Works—Fence—Construction of after Railway open for Five Years—Obligation of Company to Maintain—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 68, 73.

By s. 68 of the Railways Clauses Act, 1845, "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (inter alia) sufficient . . . . fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting . . . . the cattle of the owners or occupiers thereof from straying thereout." By s. 73, "the company shall not be compelled to make any further or additional accommodation works . . . . after . . . . five years from . . . . the opening of the railway for public use."

In consequence of the defective condition of a fence belonging to the defendants, a railway company, and separating their railway from land in the occupation of the plaintiff, a colt of the plaintiff escaped from that land through the fence on to the land of the defendants, where, owing to the dangerous nature of the premises, it suffered injury. The fence in question was first erected by the defendants more than five years after the opening of the railway for public use:—

Held, that s. 73 did not relieve the defendants from the obligation to maintain the fence in a sufficient state of repair.

Further Consideration before Lord Russell of Killowen C.J. after a trial by a jury.

The defendants were the owners of a railway running between Twyford and Henley, which was constructed under the powers of a special Act incorporating the Railways Clauses Act, 1845, and was opened for public use in 1857.

The plaintiff was the occupier of certain meadow land through which the line in question ran, upon a viaduct five feet high carried on wooden piers. The defendants did not at the time of opening the railway erect any fence between the viaduct and the meadow, and the railway at that point remained unfenced down to the year 1884, when the then owner of the meadow, a Colonel Baskerville, erected a fence close up to the piers of the viaduct. In 1886 the defendants, whose attention had been called to the fact that Colonel Baskerville's fence was an encroachment on their land, removed the fence, and erected a

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new post and rail fence on the boundary between their land and the adjoining meadow, for the purpose (inter alia) of keeping cattle from straying from the meadow on to their land. In September, 1895, two colts of the plaintiff, while at pasture in the meadow, broke through the fence, which was rotten. The colts endeavoured to get under the viaduct, which was too low to allow of their doing so with safety, and one of them struck its head violently against the timbers of the piers, and received such injuries that it had to be destroyed. There was a rank growth of nettles under the viaduct some three or four feet high, likely to irritate a horse which strayed there and cause it to plunge. The plaintiff claimed damages on the ground that the defendants were under a statutory duty to make and maintain a sufficient fence.

The jury found that the fence was rotten, that in consequence of the fence so being rotten the colt was injured, and that the viaduct was dangerous without a proper fence. The judge reserved the question of liability for further consideration.

Montague Lush, and *W. Seton*, for the plaintiff. The defendants were bound under s. 68 (1) of the Railways Clauses Act to keep the fence in sufficient repair to prevent the colt from breaking through. The defendants will rely on s. 73 as limiting the time within which they can be called upon to put up a fence. But that section only relieves them from being called upon to put up additional works: it has no application to a case in which they have made no accommodation works at all. In

(1) By s. 68 of the Railways Clauses Act, 1845, "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; . . . . sufficient posts, rails, ... or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, ... and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require."

By s. 73, "The company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway . . . . after five years from the completion of the works and the opening of the railway for public use."

Colley v. *London and North Western Ry. Co.* (1), where the company had made as an accommodation work a culvert for the purpose of carrying off water from the adjoining land, and by reason of the insufficiency of the culvert to carry off all the water damage occurred, it was indeed held that it was too late to make complaint of the insufficiency after the five years had expired. And the case of *Ryan* v. *Great Southern and Western Ry. Co.* (2) is to a similar effect. But in both those cases the works in question had been made at the time of the construction of the railway; and the adjoining owner by making no complaint within the five years, and treating them during that period as sufficient, estopped himself from afterwards requiring any better works. [He also referred to *Corry* v. *Great Western Ry. Co.* (3)]

Bucknill, Q.C., and *A. Lyttelton*, for the defendants. No distinction can be drawn between a submission for the statutory period to the existence of insufficient accommodation works and a submission to the absence of any such works altogether. If the adjoining owner is estopped in the one case, he must equally be estopped in the other. After the five years had expired the defendants could not have been made to put up any fence. Their act in putting one up was purely voluntary. They might have pulled it down the next day. They must equally be entitled to let it get into disrepair.

LORD RUSSELL of KILLOWEN C.J. This is an action to recover damages for the loss of a colt, which, by reason of defects in a fence separating the plaintiff's land from the defendants' railway, escaped from the field where it was at pasture on to the defendants' land, and there, owing to the dangerous condition of the premises, suffered injuries from which it died. The question is, whether the defendants were under an obligation to keep that fence in a sufficient state of repair to prevent animals escaping through it from the adjoining land. Now the railway in question was constructed in 1855 under a special Act which incorporated the Railways

(1) 5 Ex. D. 277. (2) 32 L. R. Ir. 15.
(3) 7 Q. B. D. 322.

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Clauses Act, 1845, and by s. 68 of the latter Act it is provided that, "The company shall make and at all times thereafter maintain the following works for the accommodation of owners and occupiers of lands adjoining the railway; . . . sufficient . . . . fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers from straying thereout." The railway was opened for public use in 1857. At that date the defendants had made no fence, as required by s. 68, to separate the land now in the occupation of the plaintiff from the railway, and the railway at that point remained unfenced on either side down to the year 1884, when, in consequence of a colt having strayed under the viaduct and injured itself, the then owner of the property, Colonel Baskerville, constructed a fence by means of rails fastened to the wooden supports of the viaduct. In 1886 the defendants caused this fence to be removed on the ground that it was an encroachment upon their land, and erected upon their boundary a new fence, which is the fence in question in the present action. This fence, as appears from the evidence of the defendants' inspector of permanent ways, was intended not only as a boundary fence between the railway and the adjoining land, but also to prevent cattle straying from the adjoining land on to the railway land. When first made it was an effective fence for that purpose. It has since been allowed to get into a state of disrepair. It was contended on behalf of the defendants that they were under no obligation to repair it. It was said, that though, under s. 68 of the Railways Clauses Act, the company are bound to provide certain accommodation works, including fences, for the protection of the adjoining owners, they cannot be compelled to do so after the expiration of five years from the opening of the railway for public use; that as the defendants had made no fence at all for more than five years, their obligation to make one had expired; that the fence which was subsequently put up was put up merely for their own convenience, and that they were not bound to repair it for the benefit of the adjoining owners. But even if the defendants are right in contending, that after the expiration of

the statutory period they could not be compelled to put up a fence, I am by no means satisfied that the conclusion which they seek to draw from those premises is one that necessarily follows. If they in fact did put up a fence, and if, as was admitted to be the case, they did so with the object of providing that very protection which, if proper steps had been taken for that purpose within the five years, they would have been compellable to provide, I am not prepared to say that they would not be bound to maintain that fence thenceforward in a sufficient state of repair. The adjoining owner would be induced, not unnaturally, to rely on the company maintaining the fence they had erected. But I do not rest my judgment on that ground. I found it upon what I conceive to be the true construction of ss. 68 and 73 of the Railways Clauses Act. The first of those two sections (to the terms of which I have already referred) creates an express statutory obligation, and is entirely silent as to the time within which the performance of that obligation can be enforced. Then comes s. 73, which provides that "the company shall not be compelled to make any further or additional accommodation works for the use of the owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or, if no period be prescribed, after five years from the completion of the works, and the opening of the railway for public use." It seems to me that the reasonable construction to be put on those words is this: that if at the time of opening the railway or within the five years the company have in fact supplied accommodation works, and those accommodation works have been accepted by the person who had a right to call for them, and if that person has not chosen within the five years to complain of their insufficiency, he cannot after the expiration of that period be heard to complain that they are insufficient and require further works to be made. But where, as here, the company have made no accommodation works at all within the five years, there is nothing which the adjoining owner can within that period accept as in satisfaction of the company's obligation, and s. 73 cannot apply. That reading of the section may, I think, also explain the decisions in the two cases relied upon by the defendants of *Colley* v.

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London and North Western Ry. Co. (1) and *Ryan* v. *Great Southern and Western Ry. Co.* (2) I am of opinion, therefore, that the defendants, notwithstanding that the period of five years from the opening of the railway has long since expired, are compellable to provide a sufficient fence to prevent the plaintiff's cattle from straying, and, having failed to discharge that duty, are responsible for the consequences. It is also to be noted that apparently the fence being allowed to become defective makes the premises more dangerous than if no fence had been erected. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *Graham Gordon.*
Solicitor for defendants: *Nelson.*

J. F. C.

C.A.
1896
July 17.

[IN THE COURT OF APPEAL.]

HOOD BARRS *v.* HERIOT. *Ex parte* BLYTH.

Practice—Execution—Married Woman—Inquiry as to Separate Property—Examination of Persons other than Judgment Debtor—Order XXXVII., *r.* 28; *Order* XLII., *r.* 32.

A direction that an inquiry is to be held as to the estate of a married woman against whom judgment has been obtained, with a view to ascertain if she has separate property free from restraint on anticipation, does not authorize the examination of any person other than the judgment debtor.

APPEAL from an order of a judge at chambers.

The defendant was a married woman against whom judgment had been obtained with costs, payable out of her separate property, execution to be limited to her separate property not subject to any restraint against anticipation, unless by reason of the Married Women's Property Act, 1882, the property was liable to execution notwithstanding such restriction. The judgment was assigned to the present plaintiff. Subsequently

(1) 5 Ex. D. 277. (2) 32 L. R. Ir. 15.

an order was made on May 12, 1896, that an inquiry should be held as to the separate property of the judgment debtor not subject to any restraint upon anticipation; and it was ordered that the judgment debtor should attend and be orally examined before one of the masters of the Supreme Court of Judicature, and should produce any books and documents in her possession relating to the inquiry. She attended accordingly, and disclosed the existence of an assignment of the arrears of income of her separate property which were due to her, and had been paid into court in a Chancery action to which she was a party. The assignment was stated to be an absolute assignment to James Blyth. The plaintiff thereupon drew up a subpœna to James Blyth entitled in the action "to attend at the examination of the above-named defendant and the inquiry directed by the order dated 12th May, 1896," and to produce the assignment. This subpœna was indorsed by a master—not being the master to whom the cause was assigned, nor the master before whom the inquiry was held—with leave to issue it; but the same master, on the application of James Blyth, rescinded this leave. This last-mentioned order of the master came before Pollock B. on an appeal by the plaintiff, which was dismissed.

The plaintiff appealed.

Bartley Denniss, for the plaintiff. An order for an inquiry as to the separate estate of a married woman involves a power to examine persons other than the debtor. This power was not questioned in *Bursill* v. *Tanner* (1), where the solicitor to the trustees of the marriage settlement of a married woman was compelled to give evidence. The order is not made under Order XLII., r. 32; but the subpœna is issued under Order XXXVII., r. 28. Any material witness may be called and examined, but not cross-examined, as might be the case under Order XLII., r. 32, for he would be the witness of the person calling him.

Montague Shearman, for the defendant. The defendant, although a married woman, is a debtor liable under a judgment or order, against whom an order can be made that she shall be

(1) 16 Q. B. D. 1.

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examined as to her separate estate: *Holtby* v. *Hodgson* (1); *Countess of Aylesford* v. *Great Western Ry. Co.* (2) This order must, therefore, have been made under Order XLII., r. 32, and no other person than the judgment debtor can be examined: *Irwell* v. *Eden.* (3) That case was decided two years after *Bursill* v. *Tanner* (4), in which the objection that there was no rule authorizing the examination of the solicitor does not appear to have been taken. Even if there were jurisdiction to summon other persons for examination, that power would be carefully exercised: *Ex parte Willey, In re Wright* (5); and only on cause shewn before the person having control over the proceeding. Here the issuing of the subpœna was treated as a mere matter of form, and the authority to do so was not obtained from the master to whom the cause was assigned, nor from the master holding the inquiry.

Bartley Denniss, in reply.

A. L. SMITH L.J. This is an appeal from an order made at chambers by Pollock B. Some time ago the original plaintiff in this action obtained judgment against the defendant, who is a married woman, for a sum of money and costs; and this judgment was assigned to the present plaintiff, who desires to get payment of the amount from the defendant if he can do so. Some information was received that the defendant had an interest in some Turkish bonds, the dividends on which had been paid into court in an action in the Chancery Division. The plaintiff accordingly obtained an order that an inquiry should be held as to the separate property of the defendant not subject to any restraint upon anticipation, and that she should attend and be orally examined before one of the masters of the Supreme Court. We have not before us the summons on which this order was made; but it is clearly an order in aid of execution, and made under Order XLII., r. 32. This would be the ordinary case of execution against a judgment debtor, but for the limitation arising from the fact that the defendant is a

(1) 24 Q. B. D. 103.
(2) [1892] 2 Q. B. 626.
(3) 18 Q. B. D. 588.
(4) 16 Q. B. D. 1.
(5) 23 Ch. D. 118.

married woman, and the order is moulded to meet that state of things. It is suggested that the order is more than this, and that it is a general order for an inquiry; but with this suggestion I do not agree. It is the usual order in aid of execution under which the defendant is to appear and be orally examined, which in effect is that the debtor is to be cross-examined to obtain from her particulars of her separate estate. We are told that she appeared in obedience to the order, and disclosed that she had assigned the property as to which she was asked to one Blyth. The plaintiff then obtained leave to issue a subpœna to Blyth from a master who obviously did not know the facts of the case. This was obtained ex parte under Order XXXVII., r. 28; but when it was explained to the master how the matter stood, he rescinded the order. On appeal, Pollock B. affirmed the course taken by the master, and an appeal is brought to this Court.

With regard to the jurisdiction to issue the subpœna, it has been decided that where an order is made for the examination of a judgment debtor under Order XLII., r. 32, only the judgment debtor can be examined; and it has also been decided that a person in the position of the defendant is a judgment debtor. The words of the order are that the Court or judge may make an order for the attendance and the examination "of such debtor, or of any other person"; but the latter words have been held, and in my opinion rightly, to apply not to persons other than the judgment debtor, but to officers of a corporation and the like. It is argued that *Bursill* v. *Tanner* (1) decided otherwise. In that case a solicitor came before me at chambers with a settlement in his hand, but declined to say who were the trustees. I decided that as he was present and had submitted to the jurisdiction he was bound to answer, and that is all that was decided in the Queen's Bench Division and the Court of Appeal. At that time the case of *Irwell* v. *Eden* (2) was not decided, in which it was clearly laid down that there is no power under Order XLII., r. 32, to make an order for the examination of any person other than the judgment debtor, or in the case of a corporation other than an officer of the defendant

(1) 16 Q. B. D. 1. (2) 18 Q. B. D. 588.

C. A. 1896

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A. L. Smith L.J.

corporation. I come therefore to the conclusion that there was no jurisdiction to issue the subpœna to Blyth, and that it was properly rescinded.

There is another point which should not be lost sight of, which is that the judgment debtor under rule 34 of the same order may be ordered to pay the costs of the proceedings; and if the plaintiff is right in this case, the judgment debtor might have to pay not only the costs of her own examination, but also the costs of the examination of all the other witnesses who might be subpœnaed. That could not have been intended, and it affords an argument against the contention put forward on behalf of the plaintiff. There is a passage in the judgment of Sir George Jessel M.R. in *Ex parte Willey, In re Wright* (1), in which he points out that a power to summon any other man who is suspected to be capable of giving information and getting the information from him, although it may be hostile to his interests, is a power out of the ordinary which ought to be very carefully exercised. What is really sought here is to get evidence from Blyth in order that the charge, mortgage, or whatever it is may be impeached, and this ought not to be allowed under this procedure. Whether on the ground of jurisdiction or discretion, the plaintiff is not entitled to a subpœna, and the appeal must be dismissed.

RIGBY L.J. I agree. For the reasons which have been already given and which I will not repeat, it is clear to my mind that no person other than the judgment debtor can be subpœnaed to give evidence under the authority of Order XLII., r. 32. The conclusion is sought to be drawn that because in this case an inquiry is ordered that involves the power to summon witnesses. That view is not supported by the Chancery practice either past or existing, nor can it be supported under Order XXXVII., r. 28. That rule provides for a subpœna for the attendance of a witness for the purpose of proceedings in chambers, and I have no doubt that it may be directed by a master as well as by a judge. There must, however, be a direction by a judge or master before whom the proceedings

(1) 23 Ch. D. 118, at p. 128.

are being had. No such order has been issued in this case by any master having charge of the inquiry; so that on this ground the order for a subpœna cannot be supported. Further, it is clear that Order XLII., r. 32, only extends to the case of the examination of the judgment debtor. There is nothing in the position of a married woman which makes her case different from that of any other judgment debtor; and I see no reason why we should extend the scope of the rule in such a case more than in any other. There is no more difficulty in finding out what a married woman's separate property is than in finding out what an unmarried woman's whole property is. The fact that there is an inquiry does not in either case alter the effect of the rule.

On the ground that there is no order of a judge or master having control over the proceeding at chambers, on the ground of want of jurisdiction to issue the subpœna, and on the ground that even if there were jurisdiction we ought not in our discretion to exercise it, I think that this application fails, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Hood Barrs & Co.*
Solicitors for defendant: *Rye & Eyre.*

A. M.

C. A.
1896
July 27, 28.

[IN THE COURT OF APPEAL.]

SEAMAN, APPELLANT; BURLEY, RESPONDENT.

Appeal—"Criminal Cause or Matter"—Poor-rate—Application for Distress Warrant—Case stated by Justices—Judicature Act (36 & 37 *Vict. c.* 66), *s.* 47.

A judgment upon a special case stated by justices on an application to enforce payment of a poor-rate by warrant of distress is a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in imprisonment of the person in default; and therefore an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division on such a case.

APPEAL from an order of a Divisional Court (Day and Lawrance JJ.) upon a case stated by justices under 20 & 21 Vict. c. 43, s. 2, and 42 & 43 Vict. c. 49, s. 33.

The appellant was a person rated to a poor-rate in respect of hereditaments situate in the parish of Paddington. The respondent was the rate-collector for that parish. A local Act was in force in that parish (5 Geo. 4, c. cxxvi.) by s. cxx. of which it was provided in substance that a person refusing or neglecting to pay a poor-rate made upon him might be summoned before justices, who were authorized and required to grant a warrant of distress for the amount due in respect of the rate, and that in default of sufficient distress it should be lawful for any such justices to commit any such person to the common gaol or house of correction for the county, there to remain without bail or mainprize for any term not exceeding six calendar months, unless payment of the amount due should be sooner made. The appellant, not having paid the amount of the rate, was summoned before justices in petty sessions, who granted a warrant of distress for the amount of the rate, but stated a case for the Queen's Bench Division, raising a question as to the validity of the rate. On the argument of the special case the Divisional Court affirmed the order of the justices.

R. C. Glen (*Jelf, Q.C.*, with him), for the respondent, took the preliminary objection that the appeal would not lie.

The proceeding for the recovery of poor-rate, whether under the local Act or under the general poor law, is a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873. The provisions of 12 & 13 Vict. c. 14, s. 2, are analogous to those of the local Act. It will be argued for the appellant that the obligation to pay poor-rate is in the nature of a civil obligation to the parish authorities. But, assuming that to be so, the question does not depend upon the nature of the original obligation, but on the nature of the proceeding by which it is enforced. It is a proceeding which may end in imprisonment for non-performance of a statutory obligation. It is contended that such a proceeding is criminal in its nature within the doctrine laid down by this Court in a series of cases: see *Mellor* v. *Denham* (1); *Reg.* v. *Whitchurch* (2); *Payne* v. *Wright* (3); *Ex parte Schofield.* (4)

Channell, Q.C., and *Macmorran, Q.C.* (*Naldrett* with them), for the appellant. A proceeding for the recovery of poor-rate is not a "criminal cause or matter" within s. 47 of the Judicature Act, 1873. The obligation to pay a poor-rate is in the nature of a civil obligation. It is put an end to by an order of discharge in bankruptcy: *Re Wetherell.* (5) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40, it receives priority over other claims in bankruptcy. If it were a criminal matter, it could not be put an end to by bankruptcy. It is contended that, where imprisonment is only a mode of enforcing payment of a civil liability, the fact that the defaulter may be imprisoned does not make the proceeding criminal. The immediate remedy for non-payment of the rate is by distress warrant. Imprisonment cannot be ordered in the first instance, but only in the event of there not being a sufficient distress. It is therefore not punishment, but only process for the enforcement of a civil liability like a writ of ca. sa., or an order for commitment under the Debtors Act, 1869, or under the County Courts Act. The power to excuse payment of poor-rate on the ground of poverty shews that the payment of poor-rate is only a civil obligation.

(1) 5 Q. B. D. 467.
(2) 7 Q. B. D. 534.
(3) 61 L. J. (M.C.) 114.
(4) [1891] 2 Q. B. 428.
(5) 19 L. J. (M.C.) 115.

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When the original obligation is civil in its nature, the fact that the procedure applied for its enforcement is similar to that applied in cases where there is a criminal offence punishable summarily before justices does not make the proceeding a criminal one: *Reg.* v. *Master.* (1) In *Mellor* v. *Denham* (2), and every one of the subsequent cases in which it has been held that the cause or matter was criminal, the original ground of complaint was a criminal offence, though perhaps a very trifling one. [They cited on this point *Reg.* v. *Price* (3); *Reg.* v. *Barnardo* (4); *Cox* v. *Hakes* (5); *Reg.* v. *Kerswill* (6); *Sweetman* v. *Guest.* (7)] The functions of the justices in granting a distress warrant are judicial so far as regards determining whether the conditions precedent to the exercise of the jurisdiction exist, but in other respects they are ministerial, which shews that the proceeding cannot be criminal: *Fourth City Mutual Building Society* v. *Churchwardens, &c., of East Ham.* (8)

R. C. Glen, in reply, cited *Reg.* v. *Tyler.* (9)

LORD ESHER M.R. It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause or matter. That it is a question of procedure may be easily seen by taking the case of an assault. An assault may be made the subject of civil procedure by action, in which case there may be an appeal to this Court; or it may be made the subject of criminal procedure as by indictment, in which case there cannot be such an appeal. This seems to me to be contrary to the argument employed by the counsel for the appellant to the effect that the question depends upon whether the origin of the proceeding, i.e. the matter complained of, is in its nature criminal or not. In each case the thing complained of is the same, namely, the assault; but there is or is not an appeal to this Court according as the procedure to which recourse is had is civil or

(1) L. R. 4 Q. B. 285.
(2) 5 Q. B. D. 467.
(3) 5 Q. B. D. 300.
(4) 23 Q. B. D. 305.
(5) 15 App. Cas. 506.
(6) [1895] 1 Q. B. 1.
(7) L. R. 3 Q. B. 262.
(8) [1892] 1 Q. B. 661.
(9) [1891] 2 Q. B. 588.

criminal. Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the Legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this Court. But I do not think it is true to say that the obligation to pay the rate is a debt. It is certainly not a debt in the ordinary sense of the term. No one can bring an action for it. It is a payment to be made in pursuance of a public duty, which cannot be enforced by action or in any other way than by proceedings before magistrates. Magistrates have some civil jurisdiction, and in the case of such jurisdiction there may be an appeal to this Court. But the question is whether this procedure for the recovery of poor-rate is criminal or civil for this purpose according to the rule laid down by this Court in the cases on the subject. Those cases do not give an exhaustive definition, but they decide that when certain conditions are fulfilled the proceeding must be treated as a criminal proceeding within the meaning of s. 47 of the Judicature Act, 1873. It has been held in those cases, as it appears to me, that when the proceeding is before magistrates, and it is one which may end in imprisonment, it must be considered to be a criminal proceeding within s. 47 of the Judicature Act, 1873, and therefore one in which there can be no appeal to this Court. In this case the proceeding was before magistrates to enforce payment of a poor-rate. The person rated might, before the proceeding was taken, have disputed his liability to the rate and appealed against the rate to quarter sessions, in which case there might ultimately have been an appeal to this Court, and possibly to the House of Lords. But the procedure for enforcement of the rate is by application to justices to issue a warrant of distress, and in default of distress by imprisonment. The cases cited, such as *Mellor* v. *Denham* (1), *Reg.* v. *Whitchurch* (2), *Ex parte Schofield* (3), and *Payne* v. *Wright* (4), all seem to me to shew that the question is not whether the proceeding must, but whether it may end in imprisonment. If it is before justices and may end in imprisonment, the cases

(1) 5 Q. B. D. 467.
(2) 7 Q. B. D. 534.
(3) [1891] 2 Q. B. 428.
(4) 61 L. J. (M.C.) 114.

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have held that it is criminal within s. 47 of the Judicature Act, 1873. For these reasons I think that in this case no appeal will lie to this Court.

KAY L.J. This is an appeal from the judgment of a Divisional Court upon a case stated by magistrates. The preliminary objection is taken that no appeal will lie by reason of s. 47 of the Judicature Act, 1873, which provides that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign." Therefore the question is whether this special case is a step in a criminal cause or matter within the meaning of the section. Primâ facie, looking at the section, it will be seen that its language has no reference to the question whether the origin of the proceeding is a civil debt or other liability, or a criminal act. The question is whether the cause or matter is a criminal cause or matter. The facts in this case were as follows. A rate had been made upon the appellant that was enforceable under a local Act, which provides that, in case a person charged refuses or neglects to pay the amount of the rate, a distress warrant may be granted by justices, and in default of sufficient distress it shall be lawful for the justices to commit the person charged to the common gaol or house of correction for six months, there to remain without bail or mainprize, unless the amount due be sooner paid. Application having been made for a distress warrant under that enactment, the justices granted it, but stated a case which raised the point whether the rate was valid. This is not the only way in which the question as to the validity of the rate can be raised. The appellant might within a certain period have appealed against the rate to quarter sessions, and in the case of such an appeal there might be an appeal to this Court, and ultimately to the House of Lords. The appellant did not take this course, but waited till proceedings before the magistrates were taken. The case stated by the magistrates was heard by the Divisional

Court, who decided against the appellant. The appellant now seeks to appeal against that judgment. The question, as I have said, is whether it was a judgment in a criminal cause or matter. That a case stated by justices may be a criminal cause or matter has been decided in many cases, as, for instance, *Mellor* v. *Denham*. (1) It was argued for the appellant that it did not necessarily follow from the provisions of the local Act that the person in default would be committed to prison, because such commitment could only take place in default of distress. But that point was before the Court in *Ex parte Schofield* (2) and *Payne* v. *Wright*. (3) In the latter case Lord Esher M.R. said: "In *Ex parte Schofield* (2) a magistrate having declined to state a case upon a point of law, a Divisional Court refused to grant a rule nisi for a mandamus to him to do so; and this Court thereupon held that, as the decision of the High Court was a proceeding or step in a case the result of which might, but not necessarily must, end in a penalty being imposed, there was no jurisdiction to entertain an appeal from that decision."

I think we are bound by the decisions on that point to hold that, though it does not necessarily follow that there will be a commitment to prison, yet, if the proceedings before magistrates may have that result, that is enough to shew that the proceeding is in the nature of a criminal proceeding in which there is no appeal to this Court. The main stress of the argument of the appellant's counsel was to this effect. He said that the non-payment of a rate was not itself a criminal act. He tried to make out that the rate was a debt. I do not think he made that out; but whether that be so or not, it may be said that the non-payment of a rate is not in itself a criminal act. If I followed the argument correctly, it was that, where non-fulfilment of a liability is a criminal act, the proceeding to enforce it may be treated as criminal, but that where it is not a criminal act, the proceeding cannot be so treated. I do not follow that distinction. It appears to me that, if there be a provision in a statute that that which is merely a civil liability

(1) 5 Q. B. D. 467. (2) [1891] 2 Q. B. 428.
(3) 61 L. J. (M.C.) 114.

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may be enforced by a proceeding in its nature criminal, that proceeding is none the less criminal for the purposes of s. 47 of the Judicature Act, 1873, because it is applied to a civil liability. If the proceedings intended by a statute to enforce a civil obligation are in the nature of criminal proceedings, then there cannot, I think, under s. 47, be an appeal to this Court. I think that this distinction is admirably dealt with by Cotton L.J. in *Reg.* v. *Barnardo.* (1) He there said: "Sect. 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding. In *Ex parte Bell Cox* (2) it was held that an appeal lay from the granting of a habeas corpus, because the proceeding in which it was granted was a civil proceeding. In *Ex parte Alice Woodhall* (3) it was held that the refusal of a habeas corpus could not be appealed from, because the refusal was in a criminal proceeding. This shews the distinction. In my opinion the question is, not whether the act which is said to have been done by Dr. Barnardo is one for which he was liable to be indicted, but whether the proceeding in which the order was made was a criminal cause or matter." I take that to be the true distinction. Therefore it does not matter whether the non-payment of the rate is a criminal act or not. If the proceeding against the person who does not pay the rate is in its nature criminal, there cannot be an appeal to this Court in it. I think the result of the decisions is that the question whether there is such an appeal does not depend on the nature of the obligation, but on the nature of the proceedings. For these reasons I think the appeal fails.

A. L. SMITH L.J. I am of the same opinion. In this case the appellant seeks to appeal from the judgment of the Queen's Bench Division upon a case stated by justices in petty sessions. The matter with which the justices were dealing was as follows. A rate had been made upon the appellant which he refused to

(1) 23 Q. B. D. 305, at p. 308. (2) 20 Q. B. D. 1.
(3) 20 Q. B. D. 832.

pay. Proceedings were thereupon taken to compel him to pay, and the justices were asked to issue a distress warrant against him, and if there were no sufficient distress the next step would be to ask the justices to commit him to prison for six months or until he paid the rate. It has been pointed out that the appellant could have taken civil proceedings to contest the validity of the rate by appeal to the quarter sessions; but this he did not do, but resisted payment of it. The question is whether this proceeding before justices to enforce the rate is a proceeding in a criminal cause or matter. I should say, if the procedure was confined to the issue of a distress warrant, that that would not be a procedure in a criminal cause or matter; but where the proceeding may, in default of distress, end in the commitment of the person who has failed to pay the rate to prison by justices in petty sessions, that cannot be said not to be a procedure in a criminal matter. It was argued by the counsel for the appellant that *Mellor* v. *Denham* (1) and all the subsequent cases were decided on the ground that the original matter or cause of complaint was criminal, though the crime might be a small one; and that, where that was the case, the proceedings were to be deemed criminal; but that where the original cause of complaint was civil and not criminal, the proceeding could not be deemed to be in a criminal cause or matter. He argued that in this case the original cause of complaint, namely, non-payment of a rate, was clearly not criminal, and therefore the proceeding to enforce payment could not be a criminal proceeding. I do not agree with that argument. In the case of *Mellor* v. *Denham* (1), in which I was counsel, the proceeding was to enforce payment of five shillings by a parent for not sending his child to school. It may be called a penalty; but I would ask whether any one would say that the parent who neglected to send his child to school was a criminal. I was met in the Court of Appeal by the argument that, as it was the case of the non-payment of a sum of money which could be summarily recovered under Jervis's Act, it was a crime though a small one, because the parent could be sent to gaol in default of payment. The cases in which prior

(1) 5 Q. B. D. 467.

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to *Mellor* v. *Denham* (1) it had been held that they were criminal causes or matters were all very different cases. *Reg.* v. *Steel* (2) was a case of a criminal information for libel. *Reg.* v. *Fletcher* (3) was a conviction for trespass in pursuit of game. *Blake* v. *Beech* (4) was a conviction for keeping a common gaming-house. There could be no doubt these were criminal offences. In *Mellor* v. *Denham* (1) I endeavoured to shew that the matter was not criminal; but the answer made was that, as the Elementary Education Act, 1874, had incorporated the provisions of Jervis's Act with relation to money recoverable summarily under the Act, the proceeding for recovery of the money was in a criminal proceeding. In all the cases from that date, as, for example, *Ex parte Schofield* (5), *Payne* v. *Wright* (6), and *Reg.* v. *Whitchurch* (7), this Court has looked to the question whether or not the proceeding before magistrates might result in a committal to prison, and, if so, have held that it was a criminal proceeding for the purposes of s. 47. In the case of *Reg.* v. *Master* (8) the Court of Queen's Bench held that the fact that a distress might be followed by a commitment to prison did not constitute the matter criminal. I must say that in my opinion that decision is antagonistic to the series of subsequent decisions upon s. 47, and, if it were necessary to determine whether it ought to be followed, I should desire time for consideration. But I do not think it is necessary to consider that decision, because there appears to me to be overwhelming authority since then to shew that, whether the original cause of complaint was in its nature criminal or not, where the procedure is under Jervis's Act and may end in imprisonment to be inflicted by a justice, the matter is criminal for the purposes of s. 47 of the Judicature Act, 1873.

Appeal dismissed.

Solicitors for appellant: *Underwood, Son & Piper.*
Solicitor for respondent: *J. H. Hortin.*

(1) 5 Q. B. D. 467.
(2) 2 Q. B. D. 37.
(3) 2 Q. B. D. 43.
(4) 2 Ex. D. 335.
(5) [1891] 2 Q. B. 428.
(6) 61 L. J. (M.C.) 114.
(7) 7 Q. B. D. 534.
(8) L. R. 4 Q. B. 285.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1896
July 27.

TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON & SONS, LIMITED.

Local Government—Nuisance—Action by Local Authority—Right to Sue if Summary Proceeding inadequate—Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 107.

The Public Health Act, 1875, enacts in s. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance:—

Held, that such proceedings must be ordinary proceedings known to the law, and that, in the absence of special damage, a local authority cannot sue in respect of a public nuisance except by action in the nature of an information with the sanction of the Attorney-General.

Wallasey Local Board v. *Gracey* (36 Ch. D. 593) approved.

APPEAL from an order of a judge at chambers discharging an order for an interim injunction to prevent a nuisance.

The action was brought by the plaintiffs, a local authority, against the defendants to obtain the abatement of a nuisance which was alleged to be injurious to the health of the inhabitants of the district. No damages were claimed against the defendants. An interim injunction was obtained which was, on the application of the defendants, discharged by Day J. on the ground that the plaintiffs, not shewing any special damage to themselves, had no right to proceed otherwise than by information at the suit of the Attorney-General.

The plaintiffs appealed.

Montague Lush, for the plaintiffs. The plaintiffs have a right under s. 107 of the Public Health Act, 1875, to proceed by action. (1) The section deals with two things—the enforcing

(1) 38 & 39 Vict. c. 55, s. 107: "Any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances,

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by injunction the abatement of a nuisance and the recovery of penalties. The latter of these matters must be the subject of action by the local authority; and it is submitted that the two branches of the section are on the same footing as regards the right of the local authority to determine whether proceedings shall be taken. The words "cause any proceedings to be taken" in the Act of 1875 mean that the local authority may by resolution declare that in their opinion an action is the best remedy, and give the necessary direction. *Wallasey Local Board* v. *Gracey* (1) is opposed to this view; but in that case enough effect was not given to the fact that the taking of proceedings is to be governed by the opinion of the local authority. If the sanction of the Attorney-General is required, his opinion, and not that of the local authority, would determine whether an action was the best remedy. There is nothing strange in giving such a power to a public body. Where the intervention of the Attorney-General is required this is expressed in the Act, as in s. 69 as to the pollution of watercourses, and s. 253 as to the recovery of penalties.

Cock, *Q.C.*, and *Pocock*, for the defendants, were not called on except as to a question of amendment by joinder of other plaintiffs, which is omitted from this report.

LORD ESHER M.R. I am of opinion that this rule must be discharged. The question arises on the interpretation of s. 107 of the Public Health Act, 1875; and the same point came before Stirling J. in *Wallasey Local Board* v. *Gracey*. (1) The view taken by that learned judge was, in my opinion, absolutely right, and must be supported by our decision.

KAY L.J. I also am of opinion that the point now before us was rightly decided by Stirling J. The ordinary law is, that when any one complains of a public nuisance he must obtain the fiat of the Attorney-General for proceedings by way of information, unless he can shew that the nuisance of which he

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and may order the expenses of and incident to all such proceedings to be paid out of the fund or rate applicable by them to the general purposes of this Act."

(1) 36 Ch. D. 593.

complains is the cause of special damage to himself, and so ground for an action. I cannot see that the Public Health Act, 1875, has altered the law in this respect. The section relied on is s. 107; but that does not say that a local authority can take proceedings which no private person can take, and which are unknown to the law. Had that been the intention of the Act, I should have expected to find the new remedy, hitherto unknown to the law, stated in explicit terms. I agree with the judgment of Stirling J., which this Court must be taken to affirm. The action, therefore, is misconceived, and the appeal must be dismissed.

A. L. SMITH L.J. The point before us is whether s. 107 of the Public Health Act, 1875, authorizes a local authority to bring an action in its own name to obtain the abatement of a nuisance. The question has been before Stirling J. in *Wallasey Local Board* v. *Gracey* (1), and he read the words of the section as entitling the local authority to take such proceedings as are known to the law for the purpose of obtaining the abatement or prohibition of a nuisance, and pointed out that it is well settled that no person can sue in respect of a public nuisance, except either the Attorney-General, or a person suffering particular damage. I have nothing to add to the judgment of the learned judge, with which I entirely agree, and which is conclusive against the plaintiffs.

Appeal dismissed.

Solicitors for plaintiffs: *Howard & Shelton.*
Solicitor for defendants: *J. Perry Godfrey.*

(1) 36 Ch. D. 593.

A. M.

1896
May 14, 15.

BENJAMIN BROOKE & CO., LIMITED *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Foreign Firm—English Trade-mark and Goodwill—"Property"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By an agreement made in England the appellants, a limited company, bought from a firm of soap manufacturers in the United States their freehold works, book and other debts, together with the goodwill of the business and the trade-marks used in connection therewith. The vendors were the owners of a trade-mark, registered in England, relating to their soap, which trade-mark was extensively circulated throughout England in newspapers and pictorial advertisements at the expense of the vendors, who had an office in London for that purpose, and by this means a large demand for the soap had been created in the United Kingdom. The vendors did not sell direct to the retail dealers in the United Kingdom, but to a syndicate of three firms, who gave orders for soap which was despatched to them in England and paid for by them by remittances sent to the vendors; the syndicate then resold it to retail dealers and others at such prices as they thought fit; about two-thirds of the total sales of the vendors were made to the English syndicate:—

Held, that the English trade-mark and goodwill were "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that the agreement was liable in respect of them to ad valorem stamp duty.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument chargeable with duty was an agreement under seal, dated July 25, 1895, between Benjamin Brooke & Co., of Philadelphia, in the United States of America (therein called the vendors), of the one part, and the appellants of the other part. By it the vendors agreed to sell and the appellants to purchase the freehold works of the vendors (situate in America), the machinery, furniture, and stock-in-trade of the vendors, the book and other debts due to the vendors in connection with their business, the full benefit of all securities for the same and of all contracts, engagements, rights, and privileges to which the vendors were entitled in relation to the business, also the goodwill of the business, all the trade-marks and names used in connection therewith, and all the cash, agencies, assets, and other property of every description to

which the vendors were entitled, except certain profits specially excepted. The consideration was to be 250,000*l.* in cash and shares, of which the sum of 189,237*l.* 19*s.* 7*d.* was attributed to the goodwill and trade-marks. None of the book debts were payable by customers in England.

The vendors were manufacturers of soap at Philadelphia, sales of which were effected by them to purchasers resident both in the United States and elsewhere, about two-thirds in value of the sales being made to a syndicate of persons in the United Kingdom. The vendors were also owners of the trade-mark or brand "Brooke's Soap Monkey Brand" relating to their soap, which was registered as a trade-mark in England; this trade-mark or brand was circulated very extensively in the United Kingdom in newspapers and pictorial advertisements, by means of which a considerable demand for their soap had been created, and at the time of sale existed, in the United Kingdom. The advertisements contained no reference either to the place where the soap was manufactured, or to any place where it could be purchased; they were inserted at the expense of the vendors, who had an office in London exclusively devoted to the insertion of such advertisements, and to other matters connected therewith.

The vendors did not take orders from or deal in any way with either the retail vendors of the soap in England, or with the consumers there, their dealings with purchasers in England being exclusively confined to selling to a syndicate association, consisting of three firms, all resident in the United Kingdom. This syndicate sent from England orders to the vendors at their manufactory at Philadelphia for such quantities of soap as they required, and the soap was then despatched therefrom direct to them in England, and was paid for by remittances sent by the syndicate to Philadelphia. The purchasing syndicate then re-sold it to retail vendors and others in England at such prices as they thought fit.

The commissioners were of opinion that in fact the thing which by the agreement was agreed to be sold under the words "the goodwill of the business and the trade-marks used in connection therewith" was, firstly and principally, the trade-

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mark and the right of using the same in the various countries to which they applied; and, secondly, the local business connection with retail vendors and others which had been created in each of those countries by the circulation of the advertisements; and that these were "property" within the meaning of s. 59 of the Stamp Act, 1891. They were further of opinion that the United Kingdom trade-mark, the right of using the same, and the connection in the United Kingdom created by the advertisement thereof, were not "property locally situate out of the United Kingdom" within the exception contained in that section. They accordingly held that so much of the consideration of 189,237*l.* 19*s.* 7*d.* as represented the price paid for the said last-mentioned matters was chargeable with conveyance duty, and arrived at the sum apportionable thereto by taking the proportion which the entire profits made by the vendors for the year 1894—namely, 31,316*l.*—bore to the profit made for the English orders for that year—namely, 19,989*l.*—and assessed ad valorem conveyance duty at the sum of 536*l.* 10*s.* If the commissioners were correct in holding that all the said last-mentioned matters were chargeable with duty under s. 59, the accuracy of the apportionment and of the ad valorem duty was not questioned.

The questions for the opinion of the Court were, whether the instrument was chargeable with the duty of 536*l.* 10*s.* in accordance with the assessment, and, if not, with what duty it was chargeable.

Murphy, Q.C. (*A. T. Lawrence* with him), for the appellants. Neither the goodwill nor the trade-mark is "property" liable to stamp duty within the meaning of s. 59 of the Stamp Act, 1891. The goodwill of a business, as defined by Lord Chelmsford in *Austen* v. *Boys* (1), "means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on." Accepting that definition, there must be a place in England where the business is carried on before there can be a goodwill attached to the business liable to

(1) 2 D. & J. 626, at p. 635.

stamp duty in this country; but the business of the appellants is entirely carried on in America, where the soap is manufactured, and what they bought under this agreement was the goodwill in America attached to the old business carried on there. It is not sufficient to bring a foreign firm within the Income Tax Acts that they carry on business with this country; they must carry on business in it: *Grainger* v. *Gough* (1); and the same rule should apply under the Stamp Acts. The trade-mark is not a subject of assessment under s. 59 of the Act. By s. 70 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), a registered trade-mark can be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and is determinable with that goodwill; if, therefore, there is no business carried on in this country, this trade-mark cannot be assigned or transmitted in connection with a goodwill that has no existence.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) (*Danckwerts* with him), for the respondents, was not called upon to argue.

POLLOCK B. To use the language of one of the "points" filed on behalf of the respondents, it is apparent from the facts of the case that by far the most valuable part of the assets is the goodwill and the trade-marks. It is impossible to contend that there cannot be a trade-mark in this country in respect of a thing manufactured abroad; and, if a person has a trade-mark, that trade-mark may be in itself a goodwill. If, in addition to owning a trade-mark in this country, a manufacturer abroad has agents here for the purpose of advertising his goods and seeing probable or possible vendees, he creates not merely a trade-mark but also a goodwill, which increases the value to him of his business and of the article sold by him. It is quite clear that this appeal must be dismissed.

BRUCE J. concurred.

Judgment for the respondents.

Solicitors for appellants: *Budd, Johnsons & Jecks.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1896] A. C. 325. W. J. B.

1896
June 16, 17.

PEARCE, Appellant *v.* BUNTING, Respondent.
THE QUEEN *v.* WEDD and Another, Justices.
Ex parte PEARCE.

Thames—Conservators—Right to take Sand—Rights of Owner of Shore—"Bed"—"Shore"—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 3, 87.

Sect. 87 of the Thames Conservancy Act, 1894, makes it unlawful for any person other than the conservators, their agents, &c., to dredge or raise sand from the bed of the Thames, except with the licence of the conservators. The appellant raised sand, without such licence, from a place between high and low water-mark of the Thames, within the district of the conservators. He claimed to take the sand under a licence from a lessee, holding under a lease, which demised the right to take sand from the place in question.

Held, that the place was part of the "shore" of the river, within the meaning of s. 3, not of the "bed," within the meaning of s. 87, that the Act did not interfere with the right of the lessee to license the appellant to take sand, and therefore the appellant could not be convicted of an offence against the Act.

Case stated by justices.

An information was preferred by the respondent, on behalf of the Conservators of the River Thames, against the appellant, for that the appellant did, being the master of the barge *Bessie*, unlawfully dredge or raise sand from the bed of the River Thames, without the licence of the conservators of the river, contrary to s. 87 of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.).

Upon the hearing evidence was given—

That the appellant raised sand without the licence of the Conservators of the River Thames; that the place from which such sand was taken was between high and low water-mark of the River Thames, within the district of the conservators; that such sand was taken when the tide was out and the place dry; that barges had taken sand for thirty years from the place in question without the licence of the conservators.

That the appellant claimed to take such sand from such place under a licence from William Foster, claiming under a

lease dated March 20, 1894, from William Booth to Foster, which purported to demise to Foster a right to take sand from the place in question; that Foster claimed to have been owner of the place in question for twelve years prior to 1892, when he conveyed the land, including the place in question, to Booth; that Foster, during such period of twelve years, and since under the lease, had granted leave to barges to take sand from the place in question, and had always been paid at the rate of 5*s.* per barge, without any licence or interference from or by the conservators.

On the part of the appellant it was contended that the place in question was the "shore" of the Thames, as defined in s. 3 of the Thames Conservancy Act, 1894 (1), and not the "bed" within the meaning of s. 87, and the justices were referred to s. 58, and other sections, in which it was contended the words "bed" and "shore" were used as referring to separate parts of the river; that Booth and Foster had at the passing of the Act the right to take sand from the place, and to grant licences for that purpose; and that this right was preserved by s. 238 (2), s. 87 being only enacted "subject to the provisions of" the Act.

On the part of the respondent it was contended—

That the place in question was part of the bed of the Thames, in fact, and within the true meaning and intent of s. 87; that there was nothing in the definition of the word "shore" in s. 3, or in any other part of the Act where the word "shore" is used, which, directly or by implication, excluded the space between high and low water-mark from forming part of the larger area constituting the bed of the river; that s. 87 was an express

(1) 57 & 58 Vict. c. clxxxvii. s. 3: "The word 'shore' means the shores of the Thames, so far as the tide flows and reflows between high and low water-marks at ordinary tides."

(2) 57 & 58 Vict. c. clxxxvii. s. 238: "Except as in this Act expressly provided, nothing in this Act shall take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity, to which any owner or occupier of any lands on the banks of the Thames, including the banks thereof, or of any eyots or islands in the Thames, or any person is now by law entitled, nor take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect, as if this Act had not been passed."

The other material sections of this and the other Acts are set out in the judgment.

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provision, within the meaning of s. 238, which overrode any reservation of private rights in s. 238, and that in face of the provisions of s. 29 of the Thames Navigation Act, 1870, and ss. 6 and 7 of the Thames Conservancy Act, 1867, the appellant could not have had, and did not have, at the time of the passing of the Thames Conservancy Act, 1894, any right to dredge or raise sand at the place in question.

Upon the evidence given the justices found the following facts :—

That the appellant, on January 5, 1896, being the master of the barge *Bessie*, did raise sand or gravel from the bed of the River Thames, in Hadleigh Ray, in the county of Essex, without the licence of the conservators ; that the spot where such sand or gravel was so raised was part of the bed of the Thames, and within the jurisdiction of the conservators.

The justices held, as a matter of legal interpretation of the Act, that the expression "bed of the Thames" included the whole river from shore to shore, at high water of ordinary tides, and that the "shore" was that portion of the bed of the Thames between high and low water-mark at ordinary tides.

The justices were of opinion that the respondent's contentions, as stated above, were correct as matters of law, and they held accordingly, and convicted the appellant.

The question upon which the opinion of the Court was desired was, whether the justices, upon the facts found, came to a correct determination and decision in point of law, and if not what should be done in the premises. (1)

June 16. *Scrutton* (*Channell, Q.C.*, with him), for the appellant. The appellant was justified in dredging the sand under his licence from Foster. There is nothing in the Thames Conservancy Act, 1894, which can have the effect of taking away or interfering with the rights to which Booth and Foster were entitled before that Act came into operation. The clause in s. 87, by which dredging without the licence of the conservators

(1) An order nisi had been obtained on behalf of the appellant to bring up and quash the conviction, and this order was argued with the argument of the special case.

is prohibited, begins with the words "subject to the provisions of this Act." The prohibition, therefore, is subject to the provisions of s. 238, the effect of which is expressly to preserve all rights which are not taken away or interfered with by the express words of the Act. These provisions make it clear that the rights now in question cannot be taken away or interfered with by general words. The appellant could not properly be convicted of dredging "from the bed of the Thames" within the meaning of s. 87, for the place from which he took the sand comes more properly within the meaning of the word "shore," as defined by s. 3. The words "bed" and "shores" are used in different senses in many places, both in the Thames Conservancy Act, 1894, and in the former Conservancy Acts which it superseded.

J. E. Bankes (*Jelf, Q.C.*, with him), for the respondent. The place where the sand was taken is part of the bed of the river, within the meaning of s. 87, and according to the definition given in the American case of *Howard* v. *Ingersoll* (1), and adopted by Romer J. in *Hindson* v. *Ashby* (2), and accepted as correct in the same case by the Court of Appeal, though they reversed the decision of the Court below on the facts. (3) The prohibition in s. 87 is express, and the case therefore comes within the words "Except as in this Act expressly provided," at the beginning of s. 238, and if any right of dredging existed before the Act of 1894 it has been taken away. He also referred to Coulson and Forbes on Waters, p. 54; *Menzies* v. *Breadalbane*. (4)

Channell, Q.C., replied.

Cur. adv. vult.

June 17. The following judgments were delivered:—

CAVE J. This case raises a question of some importance, but to my mind the point is very clear. Were it otherwise I should wish to take further time to consider the matter, but as the case stands I can see no necessity for reserving judgment.

(1) 54 U. S. 381, at p. 427, per Curtis J.

(2) [1896] 1 Ch. 78, at pp. 84, 85.

(3) [1896] 2 Ch. 1.

(4) 3 Wils. & S. 235.

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The question turns mainly on the construction of the Thames Conservancy Act, 1894 (57 & 38 Vict. c. clxxxvii. s. 87), by which "Any person, with, and in accordance with, the licence of the conservators . . . . may dredge and raise gravel, sand, ballast, and other substances, from the bed of the Thames, other than that portion thereof mentioned in s. 59 of this Act, but, subject to the provisions of this Act, it shall not be lawful for any person other than the conservators, their agents, servants, and workmen, to dredge or raise any gravel, sand, ballast, or other substance, from the bed of the Thames, other than that portion thereof mentioned in the said section, except with, and in accordance with, such licence (proof of which licence shall lie on the person accused), and if any person acts in contravention of this enactment, he shall, for every such offence, be liable to a penalty not exceeding 20*l*., without prejudice to any other remedy or proceeding against him." It is contended on behalf of the Thames Conservators that that section is intended to take away the rights of private persons and to make the owner of the shore of the river liable to a penalty for dredging and raising gravel or sand on his own soil. That would be a violent conclusion, and the argument in support of it is not improved by the fact that it is necessarily contended that the Legislature has used words vaguely and in inconsistent senses. In order to see that this contention is wrong we need not go further back than to the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.). (1) That Act in the preamble recited an agreement between Her Majesty and the Corporation of London, containing a recital that the mayor, commonalty, and citizens of London "are ready and willing to acknowledge the title of Her Majesty to the bed and shores of the River Thames." In the passage which I have read the expression "bed and soil" is exchanged for "bed and shores"—and rightly so, because Her Majesty is primâ facie entitled to the bed and shores of navigable rivers, and to the foreshore of the open sea. The agreement further recited that "it would be to the public benefit, and would facilitate the discharge of the duties of the office of conservator of the said river, that the bed and

(1) Repealed by 57 & 58 Vict. c. clxxxvii. s. 4.

soil of the said river should, upon certain terms and conditions hereinafter set forth, be vested in the said mayor and commonalty and citizens in trust for the purposes hereinafter mentioned." Here again the expression is changed from "bed and shores" to "bed and soil," and the reason is clear, for the Crown has never parted with its interest in the bed and soil of the river, but has in many instances parted with its interest in the shores. We know that there are places along the tidal waters of the Thames, and on the seashore, where private individuals have rights over the shores. The agreement then provided as follows: "Now these presents witness that the said mayor and commonalty and citizens of the City of London do wholly withdraw all claim to the ownership of the bed and soil of the River Thames, so far as the tide flows and reflows therein." The corporation had never claimed the shores of the river. The agreement went on: "and do admit that the Queen's most Excellent Majesty, in right of her Crown, is seised to Herself, Her Heirs and Successors, of the fee simple and inheritance in possession of the bed and soil of the River Thames within the flux and reflux of the tides, and of all encroachments and embankments upon, or inclosures from, the same bed and soil respectively, subject only to such grants as may have been heretofore made by Her Majesty or any of Her Royal Predecessors." That is an admission that the Crown is entitled to the bed and soil of the river, subject to any grants, made or presumed, to private individuals. The mayor, commonalty, and citizens thereby acknowledge the title of the Crown, as limited by those grants. After thus acknowledging the title of the Crown, as limited by the grants, the recited document went on to agree that all the estate, right, title, and interest of Her Majesty in right of Her Crown, as therein expressly limited, should be conveyed to the mayor, commonalty, and citizens as Conservators of the River Thames. One limitation was this: "The said grant and conveyance shall not comprise the shores or bed of the said river, or any encroachments, embankments, or inclosures thereupon or therefrom in front of or immediately adjacent to any lands, buildings, or hereditaments whereof or whereto

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Her Majesty, or any person or persons in trust for Her, is or are now seised or entitled in possession, reversion or remainder, or which may now be the property of any Department of Her Majesty's Government, or in the possession of such Department, or of any officers of the same." It is clear to my mind how the matter stands. If we take the agreement with these exceptions—first, that there were excepted all interests created up to the date of the Act, and, secondly, all the estate, right, title, and interest of Her Majesty in the shores or bed of the river, or any encroachments, embankments, or inclosures adjacent to the property of Her Majesty, or of any Government Department—we find that, so far as the rest of the river was concerned, it all went to the conservators. Then we have to see how this agreement was carried out by the provisions of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.). Sect. 50 of that Act provided that "All the estate, right, title, and interest of the mayor and commonalty and citizens of the City of London in the bed and soil and shores of the River Thames from Staines . . . . to Yantlett . . . . and all the estate, right, title, and interest to which Her Majesty was on February 23, 1857, entitled in right of Her Crown of, in, and to the bed and soil and shores of the River Thames within the flux and reflux of the tides, bounded eastward by an imaginary line to be drawn from the entrance of Yantlett Creek . . . . on the southern shore of the said river to the City Stone opposite to Canvey Island in . . . . Essex on the northern shore . . . . and of, in, and to all encroachments, embankments, and inclosures therefrom or thereupon, except such parts thereof as are hereinafter specified, shall from and after the commencement of this Act be, and the same are, hereby vested in the conservators." That is more distinct, if anything, than the agreement. The clause was made general in order to prevent any future discussion as to the rights of the parties. That section was sufficient to vest in the conservators all that the Crown had, but not to vest in them any private rights derived from the Crown before February 23, 1857. All the other sections of the different Acts relating to

the subject are consistent with this view. The Thames Conservancy Act, 1867 (30 & 31 Vict. c. ci.), s. 7 (1), contained a prohibition against dredging, in the same terms as that which I have already read from s. 87 of the Act of 1894, but limited in its operation to "the bed of the Thames between the City Stone near Staines and Cricklade," that is, the upper river. The distinction between the bed and the banks is shewn by the water level, which varies from time to time, according to the seasons and the amount of rainfall; that level indicates the difference between the bed and the banks of the river. Then the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.) (1), by s. 29, applied ss. 6 and 7 of the Act of 1867 to the lower river. By this provision it was made unlawful to dredge and raise gravel in the bed of the river without the licence of the conservators, but there was no mention of the shores, although the Act of 1870 extended the Act of 1867 to a part of the river where there are shores. Therefore I can see no reason why s. 29 of the Act of 1870 should be read as extending the provisions of s. 7 of the Act of 1867 to the shores of the river, and there is good reason why it should not be so construed, for we know that the shores of tidal rivers are sometimes private property, and it cannot have been intended by implication to take away or interfere with private rights.

Then we come to the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.). Various sections of that Act were referred to for the purpose of shewing that, when the Legislature intended to include shores, they expressly said so, and that the bed of the river did not include the shores, unless it was so expressed. By s. 58, "Notwithstanding the repeal of any enactment, or any alteration of the constitution of the conservators, by this Act effected, all the estate, right, title, and interest in, and to, the bed and soil and shores of the Thames, and in, and to, all encroachments, embankments, and inclosures thereupon or therefrom, and in, and to, all property, real and personal, which were immediately before the passing of this Act vested in the conservators, shall continue vested in them as if this Act had not been passed." The conservators before the date of this

(1) Repealed by 57 & 58 Vict. c. clxxxvii. s. 4.

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Act had the right and title of the corporation and of the Crown, but subject to such private rights as then existed; and while the Act continues that right and title to the conservators, still it does not give them the rights of private persons. Sect. 59 simply continues the reservation, which had existed under the Act of 1857, of land, &c., adjacent to the property of Her Majesty, or of any Government Department. It is extremely important that the word "shores" should be mentioned, because at the date of the Act the conservators were entitled probably to the greater part of the foreshore, and the other Acts were then repealed, and so it might have been contended, if the word "shores" had not occurred in the Act, that the rights of the conservators in the foreshore were gone. Sect. 67 provides that, "Subject to the provisions of this Act, and to any by-laws of the conservators for the time being in force, all persons shall have free liberty, with horses, cattle, or vehicles, to use any roads and ways, except tow-paths which shall for the time being belong to the conservators, and with vessels to use the locks for the time being belonging to the conservators, and the tow-paths of the Thames for towing such vessels." It is said that, because a general power is there given to use roads, ways, locks, and tow-paths for the purpose of towing, one would expect to find the shores mentioned, if they were intended to be included. On the other hand, it is contended that the shores are included without express mention. The answer to this is obvious. Some part of the shores is admittedly the property of the conservators, and, as to that part, they do not want any express mention of the shores in order to entitle them to deal with their own property; but, further than this, there is a very good reason why the word should be omitted, because, if it were inserted, it might be contended that the conservators were entitled to interfere with private rights. In my opinion the Legislature wished to exclude the shores, because they had no intention of conferring any rights over private property on the conservators. Then we come to s. 87, which I have already read. I think that section means that, with the exception referred to in the section, anybody may, with the licence of the conservators,

dredge and raise gravel, sand, ballast, and other substances, from the bed of the Thames. Then why is the expression "bed of the Thames" used there? Because the bed of the river is vested in the conservators, and they could properly have the power to license persons to dredge and raise gravel, &c. Then why is the word "shores" left out? Because, where the shores belonged to the conservators, they did not want express power to deal with them; but, if the shores were included, the conservators could license any person to dredge and raise gravel, &c., on private land. Therefore there was good reason for putting in the word "bed" and leaving out the word "shores." The same section further provides that "nothing in this section shall take away, prejudice, or affect, the rights (if any) of dredging or raising gravel, sand, ballast, or other substances, from the bed of the Thames, above the City Stone above Staines Bridge, which would have been vested in, or exerciseable by, the owners of the soil of such bed, if this Act had not been passed." This shews the anxiety of the Legislature to avoid interfering with private rights. But for this proviso it might have been supposed that, even in the upper river, a private individual might be deprived of his rights. A controversy has existed as to the rights of private persons over the bed of the river. It was contended on the one side that the bed of the river was vested in the adjoining owners as such, and on the other side that the rights of the adjoining owners over the bed of the river (if they had any) arose from presumed grants. In consequence of this the Legislature has declined to interfere with private rights in the bed and soil of the upper river.

For these reasons I am of opinion that the intention of the Legislature was not to interfere with the rights of private persons in these matters, and therefore the magistrates were wrong in convicting.

WILLS J. I am of the same opinion. In the agreement recited in the Thames Conservancy Act, 1857, which has been read, there is some confusion in the use of the words "bed and soil" and the word "shores," and, if that agreement stood

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alone, there would be good ground for saying that the words "bed and soil" were used as including the foreshore. I say so for this reason. It is recited that the corporation of London are ready to acknowledge the title of Her Majesty to the "bed and *shores*" of the River Thames. After some other recitals comes the operative part of the agreement, and it begins by a formal statement that the corporation admit the title of Her Majesty to the "bed and *soil* of the river within the flux and reflux of the tides." Now I cannot suppose that the formal admission which follows the words "It is witnessed" was intended to be either more or less ample than the admission contained in the recital, and therefore "soil of the river within the flux and reflux of the tides" is used as a synonym for shores of the river, and there is not uniformity in the language. When we come to the vesting section (50) of the Act of Parliament passed to carry out the agreement, the words used are the amplest that could be used, and the "bed and soil and shores of the river within the flux and reflux of the tides" are vested in the conservators. In the rest of the Act a careful distinction was made between the bed and the shores. In the definition clause (s. 1) the word "shore" was expressly defined, and afterwards in the Act we continually find the expression "bed and shores." If Mr. Bankes were right in his contention, the words used ought to have been "bed including shores." The bed is one thing, and the shore is another. Mr. Bankes quoted a case in the Court of Appeal, *Hindson* v. *Ashby* (1), approving a definition of the bed of a river given in an American case, *Howard* v. *Ingersoll* (2); but *Hindson* v. *Ashby* (1) arose with reference to the upper part of the river, where there was no foreshore—and as to which therefore the phrases relied upon by Mr. Bankes were immaterial. In the case of *Attorney-General* v. *Chambers* (3), Alderson B., in delivering the joint opinion of himself and Maule J., who had been asked to assist Lord Cranworth L.C., said: "That question, as I understand

(1) [1896] 2 Ch. 1.

(2) 54 U. S. 381, at p. 427, per Curtis J.

(3) 4 D. M. & G. 206; and see the same case, reported on further consideration, before Lord Chelmsford C., 4 De G. & J. 55.

it, is this: What, in the absence of all evidence of particular usage, is the limit of the title of the Crown to the seashore? The Crown is clearly in such a case, according to all the authorities, entitled to the 'littus maris,' as well as to the soil of the sea itself, adjoining the coasts of England." (1) "Soil of the sea" is the same thing as the "bed" of the present Act of Parliament. Alderson B. there draws the same distinction (namely, between "soil" and "shore") as is drawn in this Act of Parliament between "bed" and "shore." The legislation as to the shores of the Thames stands on the same footing as that as to the seashore, for that part of the Thames with which we are concerned in the present case is tidal, and therefore is part of the sea. These considerations shew that there is good reason for the use of the word "shore" in the sense in which we think it is intended to be used in this Act. Moreover, it would be contrary to the principles of legislation, as they were understood at the time when the Act of 1857 was passed, to take away private rights without giving compensation.

Judgment for the appellant. (2)

Solicitors for appellant: *Farlow & Jackson.*
Solicitor for respondent: *James Hughes.*

(1) 4 D. M. & G. at p. 213.
(2) The order nisi for a certiorari was allowed to drop.

P. B. H.

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July 30.

BAKER *v.* AMBROSE.

Practice—Bill of Sale—Affidavit of Execution—Sworn before Solicitor of Grantee—Validity of Bill—Order XXXVIII., *r.* 16—"*Party.*"

By Order XXXVIII., r. 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used":—

Held, that the above rule applies to affidavits of execution of bills of sale, and that consequently if an affidavit of execution be sworn before the solicitor acting for the grantee in the preparation of the bill, the bill of sale will be void.

MOTION for judgment after trial.

The action was for trespass and trover for breaking and entering the dwelling-house of the plaintiffs and seizing certain chattels of the plaintiffs. The defendant justified under a bill of sale whereby the plaintiffs, husband and wife, assigned the goods in question to the defendant. The commissioner before whom the affidavit of due execution of the bill of sale was sworn was the solicitor who acted for the defendant in the preparation of the deed.

Clavell Salter, for the plaintiffs. The bill of sale was void under s. 8 of the Bills of Sale Act, 1882, not having been registered in accordance with the provisions of s. 10 of the Bills of Sale Act, 1878, which requires that the affidavit of due execution shall be filed with the registrar. The affidavit, having been sworn before the defendant's own solicitor, was invalid. By Order XXXVIII., r. 16, of the Rules of the Supreme Court, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used." A party to a bill of sale is a party within the meaning of that rule. In *Vernon* v. *Cooke* (1) the Court of Appeal held that under the then existing rules of practice an affidavit of execution of a bill of sale might be sworn before a solicitor acting for both parties to the bill. But that is no longer the law. Order XXXVIII., r. 16, of the rules of 1883 was introduced to meet that decision.

(1) 49 L. J. (C.P.) 767.

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[WRIGHT J. referred to *Ex parte Johnson, In re Chapman.* (1)]

Channell, Q.C., and *E. U. Bullen*, for the defendant. Order XXXVIII., r. 16, has no application to bills of sale. It is one of a group of rules commencing with a rule that "upon any motion, petition, or summons, evidence may be given by affidavit." It applies only to affidavits used in court as instruments of evidence. It is a rule of procedure, not of conveyancing. It does not in any way alter the law as laid down in *Vernon* v. *Cooke* (2), the ground of which decision was that the objection to swearing an affidavit on behalf of a client before his own solicitor existed only in cases in which the solicitor was acting as such in some proceeding before one of the courts. The preparation of a bill of sale is not such a proceeding. The case of *Vernon* v. *Cooke* (2) is a direct authority in the defendant's favour. It can make no difference that there the commissioner acted as solicitor for both parties: he would not be acting for the grantee any the less because he also acted for the grantor. [He also referred to Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 1, sub-s. 3.]

WRIGHT J. The Bills of Sale Act, 1878, provides by s. 10 that "A bill of sale shall be . . . . registered under this Act in the following manner: . . . . . (2.) Such bill . . . . and also a true copy of such bill . . . . together with an affidavit of the time of such bill being made or given and of its due execution and attestation . . . . shall be presented to, and the said copy and affidavit shall be filed with, the registrar . . . . in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed." Then s. 13 provides that "the masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrar for the purposes of this Act." And by s. 17, "Every affidavit required by or for the purposes of this Act may be sworn before a master of any division of the High Court of Justice, or before

(1) 26 Ch. D. 338.

(2) 49 L. J. (C.P.) 767.

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any commissioner empowered to take affidavits in the Supreme Court of Judicature." Then the Rules of the Supreme Court contain certain provisions specifically relating to the registration of bills of sale: Order LXI., rr. 1, 25–27. I think that having regard to the case in the Court of Appeal, *Ex parte Johnson, In re Chapman* (1), I must hold that the Rules of the Supreme Court generally apply to bills of sale. Amongst those rules is Order XXXVIII., r. 16, which says that "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used." I think that a party to a bill of sale is a party within the meaning of that rule, and that if the affidavit of execution is sworn before the solicitor of the grantee the affidavit is insufficient, and the bill of sale is consequently void for want of due registration. In *Vernon* v. *Cooke* (2) it was, indeed, held that an affidavit of due execution of a bill of sale was good although sworn before a solicitor who acted for both parties in the preparation of the bill. Even if that case is not distinguishable upon the ground that the solicitor there acted for both parties instead of for the grantee alone, it clearly is so on the ground that it was decided under a different rule, which by its terms was applicable only to affidavits used in litigious business. The effect of that decision must be regarded as done away with by Order XXXVIII., r. 16. I am compelled to hold that the bill of sale in this case is void, and give judgment for the plaintiffs accordingly.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *A. Slater.*
Solicitor for defendant: *A. B. Chubb.*

(1) 26 Ch. D. 338. (2) 49 L. J. (C.P.) 767.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1896 *Aug.* 5.

HOOD BARRS *v.* HERIOT.

Practice — Security for Costs — Appeal — Married Woman — Attachment — Order LVIII., *r.* 15.

The question whether an order shall be made for security for the costs of an appeal to the Court of Appeal is in all cases a matter for the discretion of the Court. *Semble*, however, that, as a general rule, such an order will not be made where the appeal is against an order for attachment.

APPLICATION by the plaintiff that the defendant should give security for the costs of an appeal.

Judgment having been recovered in an action against the defendant, a married woman, in the form sanctioned by the judgment in *Scott* v. *Morley* (1), a receiver was appointed by way of execution of income of certain trust funds which had accrued due to her at the date of the judgment, and an injunction was obtained restraining her from receiving such income. (2) A judge at chambers having made an order for an attachment against her for breach of the injunction, she appealed against his order. The plaintiff now applied for an order that she should give security for the costs of the appeal, on the ground that, the only property which she had being subject to a restraint on anticipation, she had no property available for execution.

Oswald, *Q.C.*, and *Bartley Denniss*, for the plaintiff. The general rule is that, where an appellant has no property against which payment of costs can be enforced, security will be ordered. It has been held that, where a married woman has no separate property except property which she is restrained from anticipating, and she appeals without a next friend, she must give security for the costs of the appeal: *Whittaker* v. *Kershaw*. (3) The fact that the appeal is against an order of

(1) 20 Q. B. D. 120.

(2) The facts and previous history of the case appear fully from the report of *Hood Barrs* v. *Heriot*, [1896] A. C. 174.

(3) 44 Ch. D. 296.

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attachment is no reason why the general rule on the subject should be departed from.

[They also cited *In re Strong*. (1)]

Montague Shearman, for the defendant, was not called upon.

LORD ESHER M.R. The rule says that the Court may order security for costs of an appeal under special circumstances. All that this Court has ever held is that poverty or inability to pay costs is a special circumstance, and, where it exists, the Court must consider whether in the particular case it will order security to be given. The Court is not bound in such a case to order security to be given. It has a discretion in the matter which it has exercised on many occasions. For instance, where the application has been made too late, and the appeal was just coming on, the Court has refused to order security to be given, although a case of poverty was made out. Here an order has been made to attach the defendant, who desires to appeal against that order. I will assume that the special circumstance of poverty has been made out. But a most essential feature of the case, which the Court is bound to take into consideration, is that this order affects the defendant's liberty. There is no authority which shews that the Court is in any case obliged as a matter of law to make an order that security shall be given for the costs of an appeal. It is a matter absolutely in the discretion of the Court. Where the liberty of the appellant is in question, or where highly penal consequences will be entailed upon the appellant by the order appealed against, so far from thinking that the Court is bound in any case to make an order for security of costs, I think, as a general rule, the Court would not do so. The case of *In re Strong* (1) was cited as an authority that under the circumstances which exist in this case the Court must make the order for security. But it is no authority for that proposition. Lindley L.J. said in that case: "It is not necessary in this case to decide the point, which is of some importance, whether a solicitor who appeals from an order to strike him off the roll, will, if insolvent, be ordered to give security for costs. I do not say that he will

(1) 31 Ch. D. 273.

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be ordered to give it, if the order appealed from is nothing more than an order to strike him off the roll. Such an order is of a highly penal character, and it may well be that the Court will allow him to appeal from it without giving security." The case before us is not one of striking a solicitor off the rolls. It is the case of an appellant who desires to appeal against an order for her attachment. We propose to exercise the discretion we have in the matter by saying that, the appellant's liberty being in question, we will not make an order for security for the costs of the appeal.

A. L. SMITH and RIGBY L.JJ. concurred.

Application refused.

Solicitor for plaintiff: *Hood Barrs.*
Solicitor for defendant: *Rye & Eyre.*

E. L.

WEST OF ENGLAND FIRE INSURANCE COMPANY *v.* ISAACS.

1896 *June* 10, 11.

Insurance, Fire—Subrogation—Indemnity—Right of Insurer to Benefit of Contract entered into by Assured—Landlord and Tenant.

A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured, not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated.

ACTION tried in the Commercial Court before Collins J. without a jury.

The action was brought to recover the sum of 100*l.* as money received by the defendant for the use of the plaintiffs, or as the equivalent of the benefit received by the defendant from other persons in respect of a loss by fire against which he was indemnified by the plaintiffs under a policy of fire insurance effected with them, or of a right against other persons whereby

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the defendant might have protected or reimbursed himself for the loss. The facts of the case may be stated as follows:—

In March, 1876, the premises in respect of which the dispute arose were demised (with others) by Burnell and another to Jones and Hill for a term which expired in December, 1894, at a rent of 120*l.* for the whole; the lease contained covenants by the lessees to repair and to leave in repair, and also to insure the premises in the Royal Exchange Assurance Corporation in the joint names of the lessor and lessees. In 1877 Jones assigned his interest to Hill, who in 1880 assigned to Bennett. In November, 1881, Bennett effected a policy for 800*l.* on the buildings in the Royal Exchange office in the joint names of himself and the lessors, which policy was still in existence at the date of the action. On May 30, 1885, Bennett granted a lease to the defendant of a warehouse, being part of the premises comprised in the original lease, for the residue of the term less ten days, at a certain rent, with an additional rent in respect of the insurance premiums paid by the lessor; the lease contained covenants on the part of the defendant, the lessee, to repair and to leave in repair, and a covenant by Bennett, the lessor, to insure the premises and to lay out the moneys received under any insurance policy in making good damage by fire, with a proviso that if such moneys proved insufficient the defendant was to remain liable under his covenant to repair to make good the deficiency. On August 26, 1885, the defendant effected a policy in his own name with the plaintiffs in the sum of 800*l.* upon the warehouse demised to him by the sub-lease. In 1890 Bennett died, and in the following year an action was brought in the Chancery Division for the administration of his estate. On July 18, 1893, a fire happened, by which the warehouse leased to the defendant was damaged. In 1894 an order was made in the administration action by which Bennett's lease and the benefit of his policy in the Royal Exchange office were assigned to Jones, and a deed carrying out the order was duly executed. Notice to repair, accompanied by a specification or schedule of dilapidations, was given under the original lease by the lessors to Jones, who in turn gave notice to repair, with a schedule of dilapidations, to the

defendant. Jones died shortly afterwards, and his executors demanded payment from the Royal Exchange office of 100*l.*, the amount at which the fire damage had been agreed by both offices and the defendant; the defendant, however, contended at the trial that such damage would be covered by a sum of 30*l.* On March 28, 1894, the plaintiffs, who had been sued by the defendant, paid him 100*l.*, the agreed amount of the loss sustained by him by reason of the fire; at this time the plaintiffs admittedly knew of the existence of the Royal Exchange policy.

The lease having expired in December, 1894, on January 9, 1895, the ground landlords brought an action against Jones' executors to recover damages for breaches of the covenant to repair contained in their lease of 1876; and on January 19 a similar action was brought by Jones' executors against the defendant. The first action was settled by payment of a sum of 250*l.*, and, after a lengthy correspondence, the action brought against the present defendant was settled on April 4, 1895, by his paying 140*l.* to Jones' executors, who gave him a receipt for all claims under the schedule of dilapidations, which included damage by fire; the defendant at the same time undertook not to bring any action against Jones' executors for breaches of covenant under the lease of 1885. The claim of Jones' executors against the Royal Exchange office was pressed by them, and on April 19, 1895, the sum of 100*l.* was paid to them by that office in discharge of their claim. The present action was now brought to recover 100*l.* from the defendant, upon the ground that in making the settlement with Jones' executors the defendant had had the benefit of the Royal Exchange policy or of the lessor's covenant in the underlease of May 30, 1885, or alternatively that he was bound to make good to the plaintiffs the full value of his rights against his lessor which for his own reasons the defendant had renounced, and to which rights, but for such renunciation, the plaintiffs had a right to be subrogated.

Wood Hill (*Cohen, Q.C.*, with him), for the plaintiffs.
Channell, Q.C. (*Edward Pollock*, with him), for the defendant.

The arguments appear sufficiently from the judgment. The

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following cases were cited: *Darrell* v. *Tibbitts* (1); *Castellain* v. *Preston* (2); *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (3)

COLLINS J. The points have been so clearly put before me in this case that I do not think anything is to be gained by taking time to consider my judgment. There is a certain amount of complication in the history of the case, but it comes in the end to a tolerably clear point. It is not, in my judgment, necessary to trace the devolution of the title to these leasehold premises, because I think that the defendant stood towards Jones, who had acquired the reversion by assignment, in the same position in the events that happened as he would have done to his original lessor had there been no assignment by the latter of his interest. The position of affairs is this. The defendant became sub-lessee of certain premises of which Burnells were the ground landlords; Jones and Hill were the lessees, and their interest ultimately passed to one Bennett, who sub-let to the defendant. By the contract between Bennett and the defendant the latter was bound in effect to reimburse Bennett to the extent of the premiums upon the policy which Bennett had to keep up in his own name and that of the ground landlords on the premises; while Bennett was bound by his covenant to keep up that insurance and to apply the sum received from the insurance company, if any, in re-instating the premises. By the same lease the defendant covenanted with Bennett to keep the premises in repair and to yield them up in good repair. Therefore, as between the defendant and Bennett, the former was bound to repair the premises; but he had as against Bennett the right to insist on the latter getting from the insurance company and applying in reduction of his, the defendant's, liability on his covenant all the money paid by the insurance company in respect of Bennett's policy.

A fire took place, and the Royal Exchange Insurance Company, in which Bennett's policy had been effected, came into consultation with the plaintiffs, with whom the defendant for his own

(1) 5 Q. B. D. 560. (2) 11 Q. B. D. 380.
(3) 5 Ch. D. 569.

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benefit and quite independently had effected an insurance. The defendant had made a claim against the plaintiffs on his policy, and as there were two companies who might be interested in ascertaining the amount of the damage they took proceedings in common to ascertain it; the chief part in the transaction was taken by the Royal Exchange Company; but ultimately, as is admitted upon the pleadings, the amount of the damage by fire was after investigation agreed at 100*l.*, and this amount was agreed upon, not only as between the plaintiffs and the defendant, but also between the plaintiffs and the Royal Exchange Company. The fire took place rather more than a year before the expiration of the defendant's term, he being a sub-lessee for a term ten days short of that of Bennett, his lessor. At that time Bennett was dead; his property became the subject of an administration action; and eventually there was by order of the Court an assignment of his term whereby first Jones and then Jones' executors became the assignees of all his interest in the premises; by the assignment the benefit of the covenants in the lease between Bennett and the defendant became vested in Jones. When the term expired a claim for dilapidations was made by the ground landlords against Jones' executors; the latter, on the one hand, standing in Bennett's shoes, had a claim over against the defendant on the latter's covenant to repair and yield up in repair; and, on the other hand, the defendant had, as I have pointed out, a right to put in suit against the lessees—that is, the persons standing in Bennett's shoes—the covenant to apply in reduction of his, the defendant's, liability, any money received from the insurance company. The list of dilapidations served during the term by the ground landlords upon Jones had been passed on by the latter to the defendant: that was a mistake, the defendant not being the sub-lessee of the whole of the premises demised to Jones, but of a part only. That difficulty, however, was removed, and does not affect the present case; the damage done to the part of the premises in the hands of the other sub-lessee was made good by him, and no claim was made against the defendant in respect of it. The defendant, however, was in the position of a person who had broken his covenant to keep the premises in repair, and he was under the

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obligation of making good the repairs and handing over the premises in good repair; a portion of the premises had been damaged by fire, but a portion had simply become out of repair owing to the want of necessary repairs, and at the time when the claim for dilapidations was being pressed against the defendant he had in his pocket 100*l.* which he had received from the plaintiffs in respect of the damage done by the fire. Negotiations took place between the defendant and Jones' executors, and ultimately they arrived at a settlement by which the defendant paid 140*l.*; he paid that sum in satisfaction of his liability, but he also undertook (and it was part of the bargain that he should undertake) to release Jones' executors from any liability to him on the covenant to insure and apply the insurance money in re-instating the premises. The defendant was asked to assist, or at any rate not to offer any opposition to Jones' executors getting what they could from the Royal Exchange Company; but he declined to have anything to do with a matter which, as he said, did not concern him; however, he paid the 140*l.* and did formally renounce any right of action against Jones' executors.

In that state of things the plaintiffs, who had paid the defendant 100*l.* in respect of damage caused by the fire, come and say that the defendant is bound to make good to them the equivalent of the right which he had against his lessor and which for his own purposes he renounced. In the first place, they say that the defendant in fact got the benefit of that covenant in the agreement he made with Jones—that he got the full benefit of the 100*l.*, and must therefore hand that amount over to the plaintiffs. They do not, however, confine their contention to that, for there is evidence (and I am not sure it is not proved, though I only heard the evidence on one side in the matter) that the whole amount payable by the defendant to Jones' executors both for fire damage and dilapidations would have been covered by the sum of 140*l.* which he actually paid; at all events, the defendant was so advised by two surveyors. No evidence to the contrary was given, for the plaintiffs' counsel, properly, I think, relied on the admission in the pleadings, which I regard as conclusive between the parties,

that the amount of the fire damage was 100*l*. However, dealing with the matter as a question of fact as to the whole amount that the defendant might properly pay, I rather think that 140*l*. really did satisfy his whole obligation, and I do not think he really got the benefit of the 100*l*., which he might have got had he insisted upon his rights against Jones' executors when coming to a settlement with them: I do not shrink from dealing with the case from that standpoint.

Now the plaintiffs say, "We do not care whether you got the whole benefit that you might have got under the covenant of your lessor; our position is that we had indemnified you, and you were debarred from making any subsequent arrangement whereby you renounced any right to which we might have been subrogated, had we insisted upon it. If you had not made that settlement we should have been subrogated to your rights, which you would have handed over to us intact, and we should have got, and have been entitled to get, the whole of the benefit under them, or claim from you the whole of the benefit you received. If you have not received the benefit, but have given it up, that does not alter the quantum of your claim, which was really our claim, and therefore you are under an obligation—however it is to be expressed in point of law—to make that good to us." I think that that conclusion does follow from the principles laid down in the cases cited to me during the argument. I do not know that the precise point has ever been decided—that is to say, that the insurance company can come against the assured and recover from him, not the amount of a benefit he has received, but the amount of a benefit he has lost—a benefit to which they had the right to be subrogated, but which in the events that have happened has been lost to them. But I think it follows as a matter of principle from the decisions cited in the argument, if indeed it is not covered by the dicta or some of the reasoning by which those principles are arrived at and enunciated in the cases referred to.

There was one point made on behalf of the defendant, based on a dictum of Cotton L.J. in *Darrell* v. *Tibbitts* (1), which raised, I think, the only material difficulty in this case. In his

(1) 5 Q. B. D. 560.

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judgment that learned judge says: "If the company had known of the covenants in the lease, and of the actual position of the parties, it might have been said that they had paid without requiring the covenant to be enforced, and therefore had lost their remedy." I think it is a fact in this case that the plaintiffs, when they paid the insurance money to the defendant, were thoroughly aware of all the defendant's rights against the lessee; they had seen the lease, and their attention had been called to the covenant; it becomes, therefore, necessary to see whether that fact distinguishes the case and obliges the plaintiffs to renounce such rights as they might have retained had they chosen to insist upon it at the time they paid the money. Now, as has been pointed out by the plaintiffs' counsel, Cotton L.J. in a later case does make some observations which seem to be somewhat inconsistent, not with the decision, but with the suggestion which he makes in the passage that I have already cited. In *Castellain* v. *Preston* (1) he says: "If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of *Darrell* v. *Tibbitts* (2) that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that, in consequence of something which ought to have been taken into account in estimating the loss, a sum of money or even a benefit not being a sum of money is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account, and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money." I have already dealt with the difference between a benefit actually received and a benefit lost; but, subject to that difference, that is undoubtedly an expression of opinion by

(1) 11 Q. B. D. 380, at p. 393. (2) 5 Q. B. D. 560.

Cotton L.J. that the fact that a company has paid with full knowledge of the facts does not debar them from taking a subsequent account on the footing of a benefit which they knew of and had not dealt with in account when they paid. I do not myself see any principle upon which such an exception or limitation could be based unless they had so acted as to estop them and make it inequitable for them to insist upon the position which they must by their conduct as between them and their assured be deemed to have abandoned. If their conduct amounted to anything short of that, then I do not see any principle of law which could debar them after paying the money from asserting after the account had been taken that there were certain amounts they were nevertheless entitled to.

The only other point was that the true measure of the benefit which the defendant might have got, and for which therefore he had to account to the plaintiffs, was not the 100*l.* paid by the Royal Exchange Company, but the actual sum which, if the account had been properly taken, would have covered the damage done by fire; that his right simply was on a covenant by Jones to receive from the insurance company and apply in reinstating the premises such sum as was properly payable in respect of fire damage. It was contended that though the plaintiffs paid 100*l.*, the real fire damage was only 30*l.*, and therefore 30*l.* at the outside was the extent of the defendant's liability. I think that that question does not arise for decision in this case, because I think that the fact that the Royal Exchange Company had intervened and had been a party to the settlement with the plaintiffs puts it out of controversy that, for the purpose of deciding this case and ascertaining the rights of all parties, the fire damage must be taken at 100*l.*

These considerations dispose of the case; and therefore my judgment must be for the plaintiffs for 100*l.* with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Dawes & Sons.*
Solicitors for defendant: *W. & W. Stocken.*

W. J. B.

1896
June 5.

THE QUEEN *v.* COUNTY COUNCIL OF WEST RIDING OF YORKSHIRE.

Theatre—Licence—Grant of—Discretion to attach Condition to Grant—6 & 7 Vict. c. 68.

A county council acting as the licensing authority for the performance of stage plays may, in the exercise of their discretion, attach to the grant of a licence for such performances a condition that the grantee shall undertake not to apply to the excise authorities under 5 & 6 Will. 4, c. 39, s. 7, for an excise licence to sell intoxicating liquors in his theatre.

MANDAMUS to County Council of West Riding of Yorkshire to hear and determine an application for a licence for the performance of stage plays.

On March 26, 1896, William Ritchie, the proprietor and responsible manager of a theatre called the Princess Theatre, situate at Hoyland Nether in the West Riding, applied to the county council, as the licensing authority for the performance of stage plays, for a licence for the public performance of stage plays in his theatre. There is situate within twenty yards of the door of the theatre a public-house licensed for the sale of intoxicating liquors. The county council refused to grant the licence except upon the condition of the applicant undertaking not to apply for an excise licence under 5 & 6 Will. 4, c. 39, s. 7. (1) The applicant gave the undertaking without prejudice to his right to apply to the Court for a mandamus to the county council to hear and determine his application for an unconditional licence. A rule nisi for a mandamus in that behalf having been obtained,

Asquith, Q.C., and *Roskill* shewed cause. The council have an absolute discretion to grant or refuse such a licence. In

(1) By s. 7 of 5 & 6 Will. 4, c. 39, "It shall be lawful for the commissioners and officers of excise, and they are hereby authorized and empowered, to grant retail licences to any person to sell beer, spirits, and wine in any theatre . . . licensed by justices of the peace, without the production by the person applying for such licence or licences of any certificate or authority for such person to keep a common inn, alehouse, or victualling-house; anything in any Act or Acts to the contrary notwithstanding."

Ex parte Harrington (1) it was held that the justices (whose duties in respect of the licensing of playhouses have now been transferred to the county council by the Local Government Act) might, in the exercise of their discretion, refuse a licence for the performance of stage plays without assigning any reason for the refusal. But, if so, it follows that they may grant it with a condition attached. The only limitation on the council's discretion is that they must not take into consideration matters which are wholly collateral to the merits of the application. Considering the existing facilities for obtaining intoxicating liquor in the immediate neighbourhood of the theatre, the council might very properly, in the exercise of their discretion, refuse to further increase those facilities. It may be that they could not properly pass a general resolution to refuse all stage licences except on condition of the grantee not applying for a liquor licence without regard to the circumstances of the particular application: *Reg.* v. *Sylvester.* (2) But here they did take into consideration the circumstances of the particular case.

Macmorran, Q.C., and *Low*, in support of the rule. The discretion to grant or refuse licences for the sale of liquor in a theatre has been vested by the Legislature in the excise authorities. By s. 7 of 5 & 6 Will. 4, c. 39, it is enacted that "it shall be lawful for the commissioners and officers of excise, and they are hereby authorized and empowered, to grant retail licences," &c. Those words give them a discretion. Then, if so, the county council, by attaching to the grant of a stage licence the condition which they have done, are practically usurping the discretion which belongs to another body. That is not a proper exercise of their discretion.

CAVE J. I am of opinion that this rule must be discharged. It is difficult to lay down, and I do not desire to lay down, any rules by which the discretion of the committee is to be guided in such a case as this. It is enough to say that some discretion, at all events, is reposed in them. And unless the Court can see clearly that they have not exercised their discretion properly, in the sense that they have allowed considerations to influence

(1) 4 Times L. R. 435. (2) 31 L. J. (M.C.) 93.

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Cave J.

their decision which ought not to have influenced it, I do not think that the Court ought to interfere in the matter. In this case I can see nothing in the action of the committee to which exception can reasonably be taken. It is possible that an objection might have been raised if they had passed a general rule that under no circumstances should a theatre be licensed unless the licensee undertook not to apply for an excise licence. But that has not been done. In this case it has been left to the committee to have regard to the circumstances of each particular case which comes before them. They had here to consider a variety of circumstances. The propriety of allowing the sale of liquor in a theatre may vary very much according to the locality in which the theatre is situate, or the character of the theatre itself. It is a matter which might very properly be taken into consideration that there was a place where liquor could be obtained within a few yards of this very theatre. I cannot say that the committee have exercised their discretion wrongly.

WILLS J. The Lord Chancellor in the case of *Sharp* v. *Wakefield* (1) lays down very clearly the sort of discretion which is to be exercised in matters of this kind. He says: "And 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself." Now, applying those principles, is there anything which the committee have taken into consideration in this matter which is not "within the limit to which an honest man competent to the discharge of his office ought to confine himself"? It seems to me that the very fact that an excise licence can be got practically as a matter of course if the theatre licence be once granted is one of the matters which a man who wished to do his duty could not help taking into con-

(1) [1891] A. C. 173, at p. 179.

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sideration. One of the grounds upon which it is well recognised that justices may fairly refuse a licence to a public-house is that there are already too many public-houses in the immediate neighbourhood. There is already a public-house within twenty yards of this theatre. If, then, an unconditional licence were granted to the theatre, the effect would be to multiply facilities for drinking, and it is a neighbourhood in which it is not desirable to do so. If that is not a good ground for the exercise of their discretion by the committee in the way they have done, I cannot conceive what is.

Rule discharged.

Solicitors for prosecutor: *Andrew, Wood & Co., for Newman & Bond, Barnsley.*

Solicitors for county council: *Badham & Williams, for Trevor Edwards, Wakefield.*

J. F. C.

ATTORNEY-GENERAL *v.* BARON WOLVERTON.

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May 13, 14; *July* 2.

Revenue—Succession Duty—Succession—Annuity—Contract for Valuable Consideration in Money or Money's worth—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 17.

Lord W. by his will bequeathed certain bank shares on trust to pay his nephew H., who was the heir to the title, an annuity of 15,000*l.*, and to accumulate the surplus for a term for his benefit, and devised his residuary estate in trust for his wife for life, and after her decease in trust for the said H., if then living, but if dead in trust for the person who should then be the testator's right heir at common law. H. succeeded to the title, but died without issue in the lifetime of the testator's widow, and was succeeded by his brother, the defendant. The testator left five nieces, daughters of a brother older than the defendant's father, who in the event of their surviving the testator's widow (as in fact they did) would be the testator's co-heiresses and entitled to his residuary estate. A deed of arrangement was thereupon executed, to which the widow, the co-heiresses, and the defendant were parties, by which the widow assigned her interest in the bank shares (which had then fallen into the residue) and the co-heiresses and the defendant assigned their respective interests under the will to trustees upon (inter alia) the following trusts: by clause 1, subject to the widow's life interest, an annuity of 15,000*l.* was during her life to be paid to the defendant for life, and annuities were to be paid to each of the co-heiresses; by clause 2, after the death of the widow, the trustees were, until the determination of the trusts for accumulation under the deed, to "continue

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to pay the said annuity of 15,000*l.*" to the person for the time being holding the title during his life; then followed trusts for the payment of 100,000*l.* to each of the co-heiresses, with an ultimate trust of the surplus in favour of the defendant. Upon the death of the widow the Crown claimed succession duty from the defendant in respect of the annuity to which he became entitled under clause 2 of the deed:—

Held, that the annuity granted by clause 2, being derived from the estate of the co-heiresses, was not the same annuity as that granted by clause 1, which was derived from the widow's life estate, but was a new annuity, to which the defendant on the death of the widow became entitled as successor; that the arrangement made by the deed was not a contract made by the defendant "for valuable consideration in money or money's worth" within the meaning of s. 17 of the Succession Duty Act, 1853; and that succession duty was therefore payable by the defendant.

INFORMATION by the Attorney-General claiming succession duty. The following statement of facts is taken from the judgment of the Court:—

This is an information filed by the Attorney-General against Frederick, Baron Wolverton, praying that it may be declared that upon the death of Georgiana Maria Julia, Lady Wolverton, succession duty at the rate of 6½ per cent. under the Acts 16 & 17 Vict. c. 51 and 51 & 52 Vict. c. 8, s. 21, and estate duty under 52 & 53 Vict. c. 7, s. 6, became payable in respect of the value of an annuity of 15,000*l.* per annum, to which the defendant, as the person for the time being holding the title of Baron Wolverton, became entitled in possession under the trusts declared by clause 2 of an indenture of December 31, 1888, out of the income of the trust funds in the said indenture called the "settled property." The facts in the information, in so far as they are material to the decision of this case, are as follow:—

It sets out a deed of arrangement, dated December 31, 1888, between Lady Wolverton (since deceased), widow of George Grenfell, second Baron Wolverton, of the first part; Constance Gertrude Glyn, Florence Elizabeth Mary Portal, Edith Theodosia Glyn, Mabel Glyn, and Beatrice Ellerie Fetherstonhaugh (nieces of the aforesaid Baron Wolverton), who were daughters of St. Leger Glyn, a younger brother of the second Baron Wolverton, and who may conveniently be called the co-heiresses, of the second part; Albert Henry Wilmot Williams, William Wyndham Portal (husband of the said Florence

E. M. Portal), and Horatio Noble Pym, trustees of the marriage settlement of the said Beatrice Ellerie Fetherstonhaugh, of the third part; the said Lady Wolverton, Sir Richard George Glyn, and the Hon. Pascoe Charles Glyn, of the fourth part; the defendant Frederic Baron Wolverton of the fifth part; the said Lady Wolverton, the defendant, the said Pascoe Charles Glyn, and Cecil Alfred Grenfell, of the sixth part; and the said Albert Henry Wilmot Williams and William Wyndham Portal, Pascoe St. Leger Grenfell and the said Horatio Noble Pym, of the seventh part. This deed recited the will of the said George Grenfell, second Baron Wolverton, dated January 16, 1885, whereby he bequeathed all his share and interest in the banking company of Glyn, Mills, Currie & Co. to his nephew Henry Richard Glyn, who on the testator's death became third Baron Wolverton, upon trust to receive the annual produce thereof until January 31, 1892, if he should so long live, and to invest so much of that produce as in any year exceeded 15,000*l.* per annum in Government securities in the names of himself and another trustee, and to accumulate the produce thereof in like manner for his own use and benefit until January 31, 1892. The will then disposes of the residuary estate of the testator by bequeathing it to the testator's wife for life, with remainder to the said Henry Richard Glyn, if living, but, if not, to the person who should then be the testator's right heir at common law for his absolute use and benefit.

The deed then recited that the testator died on November 6, 1887, and that on July 2, 1888, Henry Richard Glyn died without issue, having succeeded to the title; also that the parties of the second part were co-heiresses-at-law and "right heir at common law of the testator." That under these circumstances it was apprehended that according to the true construction of the said will, except in the event of all the parties of the second part dying in the lifetime of Lady Wolverton without leaving issue at her death, no part of the residuary estate of the testator, including the bank shares, would devolve or come to the person for the time being holding the title of Baron Wolverton under the trusts of the will, contrary to the supposed intention of the testator. That in pursuance of an arrangement entered into

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between Lady Wolverton, the co-heiresses, and Frederic Baron Wolverton for the purpose of determining all questions relating to the residuary estate of the testator, and with the object of carrying into effect his supposed intention, Lady Wolverton as to her life interest in the said bank shares, and the co-heiresses as to their respective shares and interests of and in the residuary estate of the testator, inclusive of the bank shares, and Frederic Baron Wolverton as to his contingent interest in the residuary estate inclusive as aforesaid, had agreed to make such assignments as were thereinafter contained to the parties thereto of the sixth part as trustees to the intent that the premises intended to be assigned might be held upon the trusts and with and subject to the powers and provisions therein contained.

The deed then further recited the marriage settlement of Beatrice Ellerie Fetherstonhaugh, by which all her interest in the residuary estate of the testator was assigned to the parties to the said deed of arrangement of the third part, and then the operative part is as follows: Lady Wolverton assigned to the parties of the sixth part the income to accrue during her life on the bank shares and investments representing the same as from August 31, 1888, to be held upon trusts after declared; the parties of the second and third parts assigned all their respective interests under the will in the residuary estate of the testator and in the bank shares subject to the prior life interests of Lady Wolverton to the parties of the sixth part, to be held upon trusts after declared; and the said Frederic Baron Wolverton assigned all his interest under the trusts of the will to the same parties of the sixth part, to be held upon the trusts after declared.

The trusts of the property so assigned and thereinafter called "the settled property" were (so far as is material to be here stated) declared as follows: By clause 1, subject to the life interests of Lady Wolverton, the settled property was to be held upon trust to pay out of the income during the life of Lady Wolverton an annuity of 15,000*l.* to Frederic Baron Wolverton for life, determinable in certain events, and upon further trust during her life to pay an annuity of 1500*l.* to Mrs. Portal for her separate use, a like annuity to the trustees of Mrs. Fether-

stonhaugh, and an annuity of 1000*l.*, to be increased on marriage to 1500*l.*, to each of the other co-heiresses, and upon further trust during the life of Lady Wolverton to pay out of the annual income the clear yearly sum of 35,000*l.* to the parties thereto of the seventh part (thereinafter called "the trustees of the accumulated fund"), to be held and applied by them in accordance with trusts after declared. And certain further trusts were declared with regard to the ultimate balance (if any) of the income of the settled property during the life of Lady Wolverton.

By clause 2, after the death of Lady Wolverton, until the sums of 100,000*l.* thereinafter mentioned, and all duty thereon and all costs and claims thereinafter mentioned, should have been satisfied, and until the trust for accumulation thereinafter directed should have ceased, the trusts of the settled property were as follows: After payment of duty out of the annual income to *continue* to pay the said annuity of 15,000*l.* (which "continuing annuity" was thereinafter called "the said annuity of 15,000*l.*") in like manner as thereinbefore provided with regard to Frederic Baron Wolverton to the person for the time being holding the title of Baron Wolverton during his life. Then follow trusts for investment of the accumulated fund, and for accumulation of the income, and upon the death of Lady Wolverton for the payment to the co-heiresses, i.e., the parties of the second part (but in the case of Beatrice Ellerie Fetherstonhaugh to her trustees) of 100,000*l.* each; with further trusts, in case the accumulated fund should not at such death be sufficient to satisfy the said sums of 100,000*l.* and all duty thereon, to further accumulate and satisfy all claims in respect thereof and all duty, and subject thereto to pay over the surplus of the accumulated fund to the trustees of the settled property, i.e., the parties of the sixth part; and the ultimate trust is to invest in freehold hereditaments in England and Wales to be held to the use of Frederic Baron Wolverton during his life, with remainders in tail male and remainders over. The rest of the deed consists of provisions for the carrying out of the trusts.

The information then alleged that the arrangement made by

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the deed of December 31, 1888, took effect, and the defendant enjoyed the annuity of 15,000*l.* per annum stipulated by clause 1 of the indenture until it determined by the death of Lady Wolverton on January 10, 1894, at which time the "accumulated fund" consisted of 118,007*l.* 6*s.* 8*d.* Consols, and 70,374*l.* 14*s.* 6*d.* Metropolitan 3 per cent. Stock, and of certain cash. That upon the death of Lady Wolverton (the trust for accumulation still continuing) the trusts declared by the second clause of the deed of December 31, 1888, came into operation, and the defendant, as the person for the time being holding the title of Baron Wolverton, became entitled in possession to another annuity of 15,000*l.* out of the annual income of the trust funds called the "settled property"; that under these circumstances succession and estate duties had become payable in respect of the annual sum of 15,000*l.* which the defendant, the present Baron Wolverton, became entitled to receive under clause 2 of the deed from the date of Lady Wolverton's death until the trust for accumulation shall have ceased, which annual sum was derived by him from the parties of the second part to the second indenture (being the co-heiresses of George Grenfell, Baron Wolverton) as predecessors, or, if not, then from Lady Wolverton, or from the said co-heiresses and Lady Wolverton jointly.

The Attorney-General (*Sir R. E. Webster, Q.C.*), and *The Solicitor-General* (*Sir R. B. Finlay, Q.C.*), (*Vaughan Hawkins*, with them), for the Crown. The defendant is liable to pay succession duty in respect of a new succession created by the deed of 1888. The annuity created by clause 2 was a new annuity in respect of which the defendant was the successor and the co-heiresses were the predecessors, out of whose reversionary or expectant interests it was derived. Lady Wolverton had a life estate only, and the annuity granted by her under clause 1 ceased with her death; the co-heiresses joined in the deed for the purpose of granting an annuity to commence upon the death of Lady Wolverton. The corpus of the two annuities was likewise different: in the one case it was charged only upon the bank shares, in the other upon the bank shares and

also upon the residuary estate, their interest in which had been assigned by the co-heiresses to the trustees under the deed. The limitations of the new annuity are different from those of the annuity created by Lady Wolverton; it is limited to the person for the time being holding the title of Baron Wolverton, and not merely to the defendant personally. It is, therefore, not the same annuity, but is different both in source and in destination. Even, however, if it were the same annuity, there was a new succession upon the death of Lady Wolverton.

Secondly, the arrangement was not a contract for valuable consideration in money or money's worth, and does not fall within the exemption in favour of such contracts in s. 17 of the Succession Duty Act, 1853.

Thirdly, payment on the death of Lady Wolverton of legacy duty on the testator's estate is no answer to the claim, if by the settlement the relation of predecessor and successor was created between the co-heiresses and the defendant; the legacy duty was paid by the legatees, and not by the defendant; nor was it paid "in respect of the same acquisition of the same property" within the meaning of s. 18 of the Succession Duty Act, 1853. (1)

[They cited *Attorney-General* v. *Floyer* (2); *Attorney-General* v. *Cecil* (3); *In re Parsons, Stockley* v. *Parsons* (4); *Floyer* v. *Bankes* (5); *Davis* v. *Angel* (6); *Tetley* v. *Tetley* (7); *Attorney-General* v. *Mitchell.* (8)]

Cozens-Hardy, Q.C., and *Cripps*, Q.C. (*Danckwerts*, with them), for the defendant. The true effect of the deed is that one annuity only is created: this is apparent from the language used in clause 2, which directs the trustees to "continue to pay *the* annuity of 15,000*l.*," and speaks of it as "which continuing

(1) The defendant's answer stated, in paragraph 4, that upon the death of Lady Wolverton legacy duty at the rate of 3 per cent. was paid upon the whole of the testator's residuary estate (including the bank stock), and that it had been claimed and accepted by the Commissioners of Inland Revenue upon the passing of the estate under the will.

(2) 9 H. L. C. 477.

(3) L. R. 5 Ex. 263.

(4) 45 Ch. D. 51.

(5) 3 D. J. & S. 306.

(6) 4 D. F. & J. 524.

(7) 4 Bing. 214.

(8) 6 Q. B. D. 548.

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annuity." It may be that, if the defendant had died in the lifetime of Lady Wolverton, clause 2 would have operated to create a new annuity, as then there would have been a gap between the cesser of the annuity granted to the defendant and the coming into operation of an annuity in favour of the holder of the title for the time being; but in the events which have happened no new annuity has come into existence. The case of *Attorney-General* v. *Cecil* (1) is wholly different: in that case there was admittedly a new succession, the only question being as to who was the predecessor—a question which involved the principle upon which the duty was to be calculated; in the present case there is no succession at all. The defendant was not a mere volunteer; he was, as the co-heiresses were, a purchaser for money or money's worth. The scheme of s. 18 of the Succession Duty Act, 1853, is that only one duty shall be payable in respect of one death, and that legacy and succession duties shall not both be payable in respect of the same property; here legacy duty has been paid on the whole of the testator's residuary estate, and the defendant is not liable to succession duty also.

[They cited the following additional cases: *Attorney-General* v. *Littledale* (2); *Fryer* v. *Morland.* (3)]

The Solicitor-General, in reply.

Cur. adv. vult.

July 2. The judgment of the Court (Pollock B. and Bruce J.) was read by

POLLOCK B. [After stating the facts as above, the learned judge proceeded:—]

The defendant denied his liability upon two grounds: first, that the annuity of 15,000*l.* to which he became entitled upon the death of Lady Wolverton was one and the same annuity as was created and granted by the first clause of the deed, and therefore on the death of Lady Wolverton there was no succession. Secondly, that the arrangement which was carried out by the deed of December 31, 1888, was between Lady Wolverton, the co-heiresses, and the defendant for valuable con-

(1) L. R. 5 Ex. 263. (2) L. R. 5 H. L. 290.
(3) 3 Ch. D. 675.

sideration, and that the defendant and the co-heiresses were purchasers for value; and therefore upon the true construction of the Succession Duty Acts, and also under s. 17 of the Act of 1853, no duty was payable.

For the determination of the first of these questions we must turn to s. 2 of the Succession Duty Act of 1853, which provides as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Before effect can be given to this section the first thing to inquire is, Who is the successor and who is the predecessor of the annuity in question? If there be a succession at all there is no doubt that the defendant is the successor. If, however, the annuity to which he is said to succeed is one and the same annuity as was granted by the first clause of the deed, the predecessor was George, second Baron Wolverton. The real question would seem to be, what was the interest which the defendant took under the deed upon the death of Lady Wolverton. It is true that the defendant or his children might under the extremely improbable event of the issue of all the co-heiresses failing have succeeded to the residuary estate of George, second Baron Wolverton, but the annuity created by the second clause of the deed was, in the event which happened, an annuity derived out of the estate of the co-heiresses, and after the death of Lady Wolverton came direct to the defendant.

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It differs also from the annuity created by the first clause of the deed in this, that it is limited, not to the defendant, but to the person for the time being holding the Barony of Wolverton; so that in the event of the defendant dying during the lifetime of Lady Wolverton it would have gone after *her* death to his successor in the title. A further distinction was pointed out to us during the argument between the annuity created by the first clause and that which is given by the second clause of the deed. The former is charged only upon the testator's share or interest in the bank, whereas the latter is charged upon the same share and interest in the bank, and also upon the whole of the residuary estate of the testator and any future investments representing it. In this particular case this variation may be of no great moment; but on principle the defendant, should the interest in the bank decrease in value, derives a new and further security from the provision made by the co-heiresses.

These facts lead us to the conclusion that the annuity to which the defendant succeeded was not the same as was granted by the first clause of the deed, but was a new annuity created by the deed, and that when the defendant became entitled to it it was as successor, and that either the co-heiresses or they and Lady Wolverton together were the predecessors. In the case of *Attorney-General* v. *Floyer* (1), Lord Cranworth in his judgment as Lord Chancellor, after referring to *Lord Braybrooke* v. *Attorney-General* (2), says: "The decision of this House shews that in order to ascertain who is the settlor, within the second section, i.e., the settlor 'from whom the interest of the successor is derived,' we must inquire not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived." Applying this to the present case, the interest which the defendant took after Lady Wolverton's death was derived, not from Lord Wolverton, the testator, but from the co-heiresses, out of whose interests it came. It is not to be expected that any case can be cited in which the facts are identical with those now before the Court;

(1) 9 H. L. C. 477. (2) 9 H. L. C. 150.

but on principle it seems to us that the present case is governed by the decision in the case of *Attorney-General* v. *Cecil*. (1)

With regard to the second point urged by the defendant, although it was based upon the true construction of the Succession Duty Acts as well as upon the provision contained in s. 17 of the Act of 1853, it will be convenient to refer to the language of that section, the material part of which is as follows: "No bond or contract made by any person bonâ fide for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such . . . . bond or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." Apart from s. 17, it would seem to need no authority to shew that when property passes from one person to another by sale or mortgage for a money consideration no succession takes place. The question, however, has been fully dealt with by Jessel M.R. in *Fryer* v. *Morland*. (2) In the present case it is sufficient to say that the effect of the deed cannot be said to amount to a sale, and that Lady Wolverton and the co-heiresses were in no sense vendors, nor was the defendant a vendee. When, however, we turn to s. 17, the words used are that no contract made by any person bonâ fide "for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor"; and it was argued on behalf of the defendant that there was a consideration "in money or money's worth" for the re-settlement by the deed, and that in effect the defendant and the co-heiresses were purchasers for value; that each party had a spes successionis and, as such, interests which were "money's worth"; that the five co-heiresses acquired an interest in 100,000*l*., which under the will, had they died first, would not have come to them, and also got

(1) L. R. 5 Ex. 263.

(2) 3 Ch. D. 675.

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the annuities out of income to which under the will Lady Wolverton was entitled.

In support of this view the dictum of Lord Westbury in *Floyer* v. *Bankes* (1) was cited, where, speaking of "money or money's worth," he says, "These words appear to have been selected for the purpose of excluding the consideration of marriage"; but the case itself is a decision in favour of the Crown. The facts were as follows. Henry Bankes and his eldest son, William John Bankes, in consideration of the marriage of George Bankes (a younger son of Henry) with Miss Nugent, and in exercise of a joint power reserved to them by a previous settlement, appointed part of the family property to the intent that the intended wife, in case she survived her husband, should thereout receive for her jointure, and in lieu of dower or thirds and free-bench, a life annuity of 800*l*., free from all deductions, with powers of distress and entry; and also, in case of the death of both the appointors during the joint lives of George Bankes and his intended wife, a further life annuity of 700*l*., secured in like manner. Henry Bankes died in 1834, and William Bankes died in 1855; and subsequently, on the death of George Bankes in 1856, both the annuities became payable to his widow, and duty was claimed in respect of them as successions. Lord Westbury, on appeal from Romilly M.R., held that there was no contract, either express or implied, to pay the annuities by the appointors, or either of them, and that, even if the appointment could be held to be a contract, a valuable consideration in money or money's worth would still be required.

The remarks of Lord Westbury upon s. 17 are so valuable as bearing upon this case that it is worth while to give them more fully. He says: "To explain the intention and effect of the 17th section, it is desirable to make a few remarks on the general object and design of the Succession Duty Act. In framing the Act, the word 'succession' was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a bonâ fide contract of purchase. Money or

(1) 3 D. J. & S. 306.

property the right to receive or possess which might arise upon death under a contract made bonâ fide in return for other money or property was not as between the contracting parties to be treated as a succession; but it was not intended to except property arising upon death under contracts for valuable consideration generally. Marriage is by the law of England a valuable consideration for a contract, and that of the highest kind; but property arising under a contract in consideration of marriage is not excepted, even in favour of persons coming directly within that consideration. A contract to be excepted must be bonâ fide made in consideration of money or money's worth—words which appear to have been selected for the purpose of excluding the consideration of marriage. Where, under a contract, money or money's worth is to be received by one person from another on the expiration of some life or lives, and such contract is made bonâ fide for the consideration of money or money's worth, the 17th section declares that the relation of predecessor and successor shall not arise between the person contracting to pay or transfer and the person entitled to receive, otherwise post obit bonds and contracts for the purchase of deferred annuities would create successions. So if the owner of a freehold estate in fee simple contracts to sell it for a sum of money subject to and reserving a life interest in himself the relation of predecessor and successor will not arise between the vendor and the purchaser. So if two persons contract with a third for a purchase of a freehold estate and pay for it jointly, directing the conveyance to be made to one for life, remainder to the other in fee, there will not be the relation of predecessor and successor between the vendor and the remainderman, although it is clear that the remainder in fee will be a succession. These are examples of the purposes which the 17th section was intended to answer. It is true that if the words of the 17th section do according to their ordinary meaning apply to and exclude other cases than those to which it was intended to be limited, the words being found in an Act taxing the subject must not be restrained by construction, even although the giving them their full latitude of meaning may defeat the object of the Act. On the other hand, the word

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'contract' in the 17th section must not, for the purposes of exemption, be extended beyond those limits which the context plainly shews to be the true meaning and intent of the word."

The view which has been taken in these cases is supported by older decisions under the Annuity Act (53 Geo. 3, c. 141). Sect. 10 excepted annuities "granted without regard to pecuniary consideration or money's worth" from the operation of the statute; and it was held in several instances that annuities granted in consideration of the conveyance of an estate, or as part of a family arrangement, or in consideration of marriage, were granted without regard to "money's worth" within the meaning of the Act, and consequently did not require enrolment: see *James* v. *James* (1); *Blake* v. *Attersoll* (2); *Tetley* v. *Tetley* (3); *Mestayer* v. *Biggs* (4); *Massey* v. *Nanney*. (5)

It seems to us that, according both to reason and authority, the Crown is entitled to judgment for the amount claimed.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Waterhouse, Winterbotham, Harrison & Harper.*

(1) 2 B. & B. 702.
(2) 2 B. & C. 875.
(3) 4 Bing. 214.
(4) 1 C. M. & R. 110.
(5) 4 Scott, 258.

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In re NEWTON.
Ex parte NATIONAL PROVINCIAL BANK OF ENGLAND.

Bankruptcy—Secured Creditor—Proof, right to Amend—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., rr.* 12 (*a*), 13.

By the Bankruptcy Act, 1883, Sched. II., r. 12 (*a*), where a secured creditor has valued his security the trustee may "at any time" redeem it on payment to the creditor of the assessed value; and by rule 13 a secured creditor may "at any time" amend his valuation and proof on shewing that the security has increased in value since its previous valuation. A secured creditor having valued his security, it subsequently greatly increased in value, and thereupon the trustee gave notice to redeem it, and tendered payment of the assessed value to the creditor, who refused to accept the tender:—

Held, that the creditor was entitled, under rule 13, to amend his valuation and proof notwithstanding such tender and refusal.

APPEAL from a decision in bankruptcy of the judge of the Bristol County Court.

In 1893 Newton, the debtor, assigned to his bankers, the National Provincial Bank of England, a policy of insurance on his life for 500*l.* as security for payment of an overdraft on his banking account with them and of other liabilities. In December, 1894, a receiving order was made against the debtor, and a trustee of his estate was shortly afterwards appointed. The bank sent in a proof of the debts due from the debtor to them which amounted to 517*l.*, and in that proof they valued their security at 10*l.*

On December 10, 1895, the debtor died, and the policy accordingly increased in value to 500*l.* Immediately on hearing of the death the bank gave notice of it to the assurance society, and proceeded to prove their title to the policy. On December 21, 1895, the trustee went to the bank and served a notice that he elected to redeem the policy upon the manager, and tendered to the manager the sum of 10*l.* in gold, which he refused to accept. Subsequently the bank applied to the trustee for leave to amend their proof. The trustee having refused to grant such leave, an application was made by the bank in the county court for leave to amend the proof by inserting therein 500*l.* as the value of the policy.

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The county court judge gave leave to amend, and the trustee appealed.

Muir Mackenzie, for the appellant. The trustee was entitled, under Sched. II., rule 12 (*a*), of the Bankruptcy Act, 1883 (1), to redeem the security held by the bank on payment to them of the value at which they had assessed it. The right of the bank to amend their valuation and proof under rule 13 was at an end when the trustee elected to avail himself of his statutory right of redemption, and tendered the assessed value of the security. Tender and refusal to accept the tender are equivalent to payment: *Chilton* v. *Carrington*. (2) This case is, therefore, within the decision of the Court of Appeal in *Ex parte Norris, In re Sadler* (3), where the Court pointed out that the words "at any time" in rule 13 must receive some limitation, and held that the creditor had a right to amend at any time before payment of the assessed value of his security. A secured creditor cannot claim to share with the general body of the creditors unless he brings in his security. If he chooses to value it, and the trustee elects to redeem, and tenders the assessed value, the subsequent increased value ought to be brought into the general estate.

(1) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 9: "If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

"10. If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt.

"11. If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

"12 (*a*). Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

"13. Where a creditor has so valued his security, he may at any time amend the valuation and proof on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

(2) 15 C. B. 95.

(3) 17 Q. B. D. 728.

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H. Reed, Q.C., and *T. E. Weatherley*, for the respondents, were not heard.

VAUGHAN WILLIAMS J. I am of opinion that the decision of the learned county court judge was perfectly right. The question has to be decided entirely on the construction of rule 13, which provides that a creditor who has valued his security may "at any time" amend his valuation and proof. Now, Lord Esher M.R. in *Ex parte Norris, In re Sadler* (1), pointed out that the words "at any time" must be subject to some limitation, because, he says, "it is impossible to suppose that after the trustee has paid the amount of the valuation, and has thus on behalf of the general body of the creditors become the purchaser of the security, the creditor can undo all that." He goes on: "Is there any other implied limitation? I think there may be another with reference to the right which by clause (*c*) of rule 12 is given to the creditor to require the trustee to elect whether he will redeem the security. But no such limitation applies to the present case, for the conditions which give rise to that right of election do not exist. Therefore, the only limitation which could apply is this, that after a trustee has paid the amount at which the security has been valued by the creditor, the creditor cannot re-open the transaction." In the case before us we have to say whether such time has elapsed, or such events have happened, as to deprive the creditor of his right of amendment having regard to the limitation laid down by the Court of Appeal. In my judgment nothing of the sort has happened. It is not denied that there has been no payment by the trustee of the amount at which the security was valued, but it is said that there has been a tender of the amount, which is equivalent to payment. I may point out, however, that the distinction between this case and *Ex parte Norris, In re Sadler* (1), is a very fine one, because there the trustee wrote to the creditor's solicitors giving notice that it was his intention to redeem the policy valued in the creditor's proof, and unless the additional fact relied on here as taking away the creditor's right to amend—

(1) 17 Q. B. D. 728.

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namely, that the notice to redeem was coupled with a tender of the amount at which the policy was valued—makes a difference, there is none. I do not think that additional fact ought to make any difference whatever. I think the Court of Appeal meant to say, as matter of principle, that the rule ought so to be construed as to give the creditor the right to amend, unless by something which has happened the position of the trustee and the creditor has become so altered that the rights of the parties concerned may be considered to be fixed on the basis of the alteration. That would be so where the trustee had paid the creditor the amount at which his security had been valued, but it is not so here. It is perfectly clear that the Legislature did not mean that the mere fact that the creditor's security had increased in value since his valuation of it should take away his right to amend, because by the very terms of rule 13 he may amend on shewing to the satisfaction of the trustee or the Court that his security has increased in value since its previous valuation. It is suggested that the Legislature intended there should be an unseemly race of this sort between trustee and creditor—that the trustee on hearing of the death of the insured person could rush off to the bank, tender the amount at which the policy had been valued, and require them to hand over their security. I cannot think that the Legislature intended anything of the kind. The creditor has a right to amend until the amount at which he has valued his security has not only been tendered to him, but accepted by him. I may add that I am very much inclined to doubt whether tender and acceptance together would be sufficient to take away the creditor's right to amend if he did not know the true facts at the time he accepted the amount tendered. I am of opinion that this appeal fails.

WRIGHT J. I entirely agree.

Appeal dismissed. Leave to appeal refused.

Solicitors for appellant: *Meredith, Roberts & Mills, for Sibley & Dickenson, Bristol.*

Solicitors for respondents: *Wilde, Berger & Moore.*

W. A.

Approved. THEOPHILE *v.* SOLICITOR-GENERAL. [1950] 1 All E.R. 405.

Approved. THEOPHILE *v.* SOLICITOR-GENERAL [1950] A. C. 186

Applied. *Re* A DEBTOR (No. 335 OF 1947). [1948] 2 All E.R. 533.

In re DAGNALL.
Ex parte SOAN AND MORLEY.

1896
Aug. 3.

Bankruptcy—Married Woman—"Carrying on a Trade"—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

By s. 1, sub-s. 5, of the Married Women's Property Act, 1882, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

A married woman having carried on a trade separately from her husband sold the business. Shortly afterwards she gave notice to her creditors that she was about to suspend payment of her debts, and thereupon a bankruptcy petition was presented against her by two creditors in respect of trade debts incurred by her prior to the sale:—

Held, that a receiving order might be made against her—

By Vaughan Williams J. on the ground that the fact of her having trade debts undischarged at the date of the petition was evidence from which it ought to be inferred that she was still carrying on the trade at that date;

By Wright J. on the ground that having once carried on a trade she continued, even after she had ceased to carry it on, to be subject to the bankruptcy laws in respect of the debts incurred by her during the period of her trading.

APPEAL from refusal of the registrar of the Brighton County Court to make a receiving order.

The debtor, Mrs. Dagnall, who is a married woman, for eight months prior to December 15, 1894, carried on separately from her husband the trade of a licensed victualler at the Railway Hotel, Crawley. On December 15, 1894, she sold the goodwill of the hotel and gave up possession of the premises to the purchaser. On January 2, 1895, her solicitors, upon her instructions, issued a circular letter to her creditors in the following terms:—

"Sir,—Mrs. Dagnall has placed her affairs in our hands, and in pursuance of our advice we have received instructions to call a meeting of her creditors and lay her circumstances before them. We beg therefore to inform you that such meeting will be held at our offices High Street, Reigate, on Tuesday next the 8th day of January, 1895, at half-past three o'clock.

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Please send us at once a statement of your account." Shortly afterwards two of her creditors, Herbert Soan and Julius Morley, being creditors in respect of trade debts for beer and spirits supplied to her in her trade as a licensed victualler, presented a bankruptcy petition against her in the Brighton County Court, alleging as the act of bankruptcy the above-mentioned circular letter to the creditors. The registrar of the county court dismissed the petition on the ground that, the debtor having sold her business prior to the commission of the alleged act of bankruptcy, was not "carrying on a trade" at that date within the meaning of s. 1, sub-s. 5, of the Married Women's Property Act, 1882, and was consequently not subject to the bankruptcy laws at that date. The petitioning creditors appealed to the Divisional Court, who remitted the matter to the registrar to find whether the debtor was possessed of separate estate at the date of the petition, and also whether she was possessed of separate trade property. The registrar reported that he found both questions in the affirmative.

The matter came on again for hearing before the Divisional Court.

Bigham, Q.C., and *R. G. Glenn*, for the petitioning creditors. The meaning of s. 1, sub-s. 5, of the Married Women's Property Act, 1882, is that a woman who once carries on a trade and contracts debts as a trader becomes subject to the bankruptcy laws, and continues to be so until she has discharged her trade debts, even though she may have ceased to carry on her trade. Under the old law of bankruptcy, in force at a time when only traders could be made bankrupt, a man who had retired from business might be made a bankrupt in respect of debts contracted before he did retire: *Meggot* v. *Mills*. (1) Similarly in *Ex parte Bamford* (2), a case decided on an Act of Parliament which provided that persons "using the trade of merchandise" might be made bankrupt, it was held that an act of bankruptcy committed after retiring from trade was sufficient. The reasoning of those cases is equally applicable

(1) 1 Ld. Raym. 286. (2) 15 Ves. 449, a.

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to the present case, for the language of the Acts is substantially the same. The liability having once attached, the trader cannot get rid of her liability by giving up her business. In *Ex parte Schomberg, In re Schomberg* (1), it was indeed held that to constitute a debtor a trader within s. 6, sub-s. 6, of the Bankruptcy Act, 1869, which provided that a debtor should commit an act of bankruptcy if he "being a trader has for the space of seven days . . . . neglected to pay" the sum specified in a debtor's summons, he must have been a trader at the time when the debtor's summons was served; and in *Ex parte McGeorge, In re Stevens* (2), it was also held under sub-s. 3 of the same section, which provided that a debtor committed an act of bankruptcy if "being a trader he departed from his dwelling-house," that a debtor did not bring himself within that provision unless he was a trader at the time of the departure. But the language on which those cases turned was very different from that in the section now before the Court.

Witt, Q.C., and *Poley*, for the debtor. The words of the section of the Married Women's Property Act are "carrying on a trade" in the present tense. The plain meaning of those words is that she must be carrying it on at the material time, that is to say at the time when it is sought to subject her to the operation of the bankruptcy laws. If the contention of the other side is right, they must go the length of saying that a married woman who has once been a trader may be made bankrupt in respect of debts contracted after she ceased to trade. In order to avoid that conclusion they seek to read into the section words limiting its application to debts contracted during the period of trading. The case is covered by the authority of *Ex parte Schomberg* (1) and *Ex parte McGeorge*. (2) It is inconvenient to give different meanings to what are practically the same words in different Acts. The debtor must be a trader at the time when he commits the act of bankruptcy: *In re Reynolds, Ex parte Reynolds*. (3) Further, there is no evidence of any act of bankruptcy. The letter of

(1) L. R. 10 Ch. 172. (2) 20 Ch. D. 697.
(3) 52 L. J. (Ch.) 431.

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January 2, which has been relied on, does not amount to a notice of suspension of payment.

R. G. Glenn, in reply.

VAUGHAN WILLIAMS J. The main question in this case is whether Mrs. Dagnall is liable to the bankruptcy laws under the circumstances which have been found by the registrar. That question turns on s. 1, sub-s. 5, of the Married Women's Property Act, 1882, which provides that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." Now, Mrs. Dagnall was a married woman who undoubtedly carried on a trade down to December 15, 1894. On that date she sold her business, and on January 2, 1895, she issued to her creditors a circular which is said to have been a notice of suspension of payment, and an act of bankruptcy. Mr. Bigham contends that the words "every married woman carrying on a trade" include a married woman who having carried on a trade has ceased to do so at the date of the act of bankruptcy. He hesitated indeed to say that the section would extend to the case of a married woman who had not only ceased to carry on a trade, but had also discharged all the liabilities incurred by her in that trade whilst she carried it on. But I fail to see how he can avoid that conclusion if he is right in saying that it applies at all to a married woman who has ceased to carry on a trade. I think his construction is not the right one. In my judgment the words "every married woman carrying on a trade" mean so long as she carries on the trade, and do not mean that she is to be liable to the bankruptcy laws any longer than the time during which she carries it on. But whether a person is carrying on a trade or not is a question of fact; and if it were not for the decision in *Ex parte McGeorge* (1), I should have said without any hesitation that as long as a woman trading separately from her husband had not paid the trade debts which she had incurred, so long she was continuing to trade. It seems to me that trading is not completed until you have

(1) 20 Ch. D. 697.

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performed all the obligations that the fact of trading imposed upon you. And that was the view that was taken in the older cases. Then we have to consider whether there is anything in the decision in *Ex parte McGeorge* (1) which prevents us from holding that the non-payment of debts incurred by a married woman while trading separately is evidence that she is still continuing to trade. That was a decision under the Bankruptcy Act, 1869, upon the meaning of the words "being a trader." There had been an earlier decision—*Ex parte Schomberg* (2)—upon the same words, "being a trader" occurring in another part of the same Act, and Jessel M.R. in following that decision pointed out that the older cases decided under the earlier Bankruptcy Acts were not binding upon him, the words to be construed in those cases being different—"using the trade of merchandise." In the same way, I think we are entitled to say that the decision in *Ex parte McGeorge* (1) is not binding on us as to the meaning of the words "carrying on a trade" in the Married Women's Property Act, 1882.

There is a subsidiary question as to whether the particular circular issued by Mrs. Dagnall to her creditors amounted to a notice that she was about to suspend payment of her debts. In my judgment, it did. It is true that it did not in terms state that she would suspend payment; but it was such a statement that it would have been dishonest in her if between the date of its issue and the date of the holding of the meeting announced by it she had attempted to settle with any of her creditors separately. I think it must be read as announcing to the creditors that she would in the meantime suspend payment to individual creditors, and deal with them all collectively at the meeting. In my opinion, therefore, the receiving order was wrongly refused, and the appeal must be allowed.

WRIGHT J. I agree that this appeal must be allowed, upon the short ground that in my view the natural meaning of the section is that a married woman who trades separately is to be subject to the bankruptcy laws in respect of all debts incurred by her in the period during which she was carrying

(1) 20 Ch. D. 697. (2) L. R. 10 Ch. 172.

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on the trade. The cases of *Ex parte McGeorge* (1) and *Ex parte Schomberg* (2) are not binding upon us for the reason pointed out by my brother Williams. They were decisions upon a different statute expressed in different language.

Appeal allowed.

Solicitors for petitioning creditors: *Slark & Co., for Cotching, Horsham.*

Solicitors for debtor: *Barraud, Regge & Jupp.*

J. F. C.

C. A.

1896

July 21.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN THE WILLESDEN LOCAL BOARD AND WRIGHT.

Local Government—Public Health Acts—Streets—Sewering, Paving, &c.—Apportionment of Expenses—Dispute as to Apportionment—Arbitration—Award—Enforcing Award under Arbitration Act, 1889—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 180—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 12, 24.

An award under s. 150 of the Public Health Act, 1875, as to the proportion of the expenses, incurred by an urban authority in sewering and otherwise making good a street, to be borne by a person to whom notice has been given requiring him to sewer and otherwise make good a portion of the street, cannot be enforced under s. 12 of the Arbitration Act, 1889.

APPEAL of the Willesden Local Board from an order of a judge at chambers.

In the year 1893 the board served a notice requiring the owners of a street within the district to sewer, pave, and make good the same, and, the notice not being complied with, the board executed the works and apportioned the expenses. A dispute having arisen between the board and Wright, against whom the board claimed, as being an adjacent owner, a proportion of the expenses incurred by them, an arbitrator was appointed under s. 150 of the Public Health Act, 1875, and an award made. The award was made on September 23, 1893,

(1) 20 Ch. D. 697. (2) L. R. 10 Ch. 172.

but no proceedings were taken before justices within six months to enforce it. The amount apportioned by the award as payable by Wright was 175*l.*, and this sum not having been paid the board applied in June, 1896, at chambers, under s. 12 of the Arbitration Act, 1889, which enacts that "An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect," for leave to enforce the award. The master refused leave, and his decision was affirmed by Pollock B.

The local board appealed.

R. E. Moore, for the local board, in support of the appeal. The application at chambers was refused on the ground of want of jurisdiction; but by s. 180, sub-s. 14, of the Public Health Act, 1875, a submission under the Act may be made a rule of court, and therefore comes within s. 12 of the Arbitration Act, 1889, and the order asked for can be made. No question of discretion arose at chambers.

John Mews, for Wright. The only remedy for enforcing payment of the amount awarded is that given by the statute: per Bacon V.-C. in *West* v. *Downman*. (1) That was a decision under the Public Health Act, 1848, s. 69 of which is the same in this respect as s. 150 of the Public Health Act, 1875. In the Court of Appeal it was pointed out by Jessel M.R. as a settled rule, that if a statute creates a new right, and gives a particular remedy for enforcing it, there is no other remedy. The arbitration deals with amount and not with liability. If it is sought to enforce payment before justices the liability can be disputed: *Eccles* v. *Wirral Rural Sanitary Authority*. (2) But if there is a summary remedy under the Arbitration Act, the landowner is shut out from any defence that he may have as to his liability. The Arbitration Act, 1889, by s. 24 only applies so far as that Act is not inconsistent with the Act regulating the arbitration, and therefore does not apply when the only remedy is a summary one before justices. [He cited *Walker* v. *Beckenham Local Board* (3); *Tottenham*

(1) 14 Ch. D. 111, at p. 117. (2) 17 Q. B. D. 107.
(3) 50 L. T. 207.

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Local Board v. *Rowell* (1); *Tottenham Local Board* v. *Rowell.* (2)]

R. E. Moore, in reply. The arbitration includes more than a question of amount: *Sandgate District Local Board of Health* v. *Keene.* (3) This is pointed out in the judgments, Fry L.J. stating that the arbitrator may have to determine matters arising on the construction of the statute, the total amount of the expenditure, and the physical facts of the case, and Lopes L.J. that the statute cannot be read otherwise than as dealing with any dispute that may arise. The decision in *West* v. *Downman* (4) cannot mean that no proceeding but a summary one can be taken, because that would exclude the power to go to a county court, which is expressly given in certain cases. [He cited *Brierley Hill Local Board* v. *Pearsall.* (5)]

Lord Esher M.R. The question in this case is whether the master and the judge were right in declining to make an order to enforce the award. If it is an award that can be enforced under the Arbitration Act, 1889, I can see no reason for a refusal; but I think the master and the judge were right, because the award is not within the Arbitration Act. In *West* v. *Downman* (4) it was pointed out that before the Public Health Act, 1848, the local board could not recover from the owners of property the expenses of work done, but that that Act conferred the right to recover such expenses, and imposed a liability on the adjoining owners. That was a new liability not previously known to the law, and it is a settled rule that in such a case the remedy given by the statute is the only remedy for enforcing the right. The Court had then to look at the Act and see what was the remedy given by way of enforcing this liability. The remedy was given by s. 69 of the Public Health Act, 1848, which corresponds with s. 150 of the Public Health Act, 1875, by summons before justices on summary process. It may be that if alternative remedies or

(1) 1 Ex. D. 514.
(2) 15 Ch. D. 378.
(3) [1892] 1 Q. B. 831.
(4) 14 Ch. D. 111.
(5) 9 App. Cas. 595.

several remedies are given, that proposition would be extended to this extent: that the remedies would be confined to any of those enacted in the statute. It therefore becomes necessary to look at the whole statute and ascertain if there is any other remedy given alternatively or in conjunction with the summary one under s. 150. It is said that such remedies are to be found in ss. 257, 261. Taking the latter section, we find that where the amount claimed is under 50*l.* the local authority, instead of going before justices, may take proceedings in the county court as if such demands were debts within the cognizance of such courts. The matter to be determined is the same which the justices would have had to determine if the sum were over 50*l.*, or if the local authority did not exercise the right of going to a county court. That is not altering the liability imposed by s. 150, but only altering the tribunal before which that liability, whatever it is, is to be determined, and no right is given to bring an action in the High Court. Then, can s. 257 be said to authorize the local authority to bring an action? That section deals with cases in which an owner is made liable under the Act, that is, liable under s. 150, and it shews, not that they may bring an action, but that they may make the amount a charge upon the property which they can thereafter enforce against the owner for the time being. Then there is s. 180, sub-s. 14, which enacts that a submission to arbitration under the provisions of the Act may be made a rule of court. If that gives a power to bring an action, it can only do so by implication. Can it be said that there is a necessary implication to that effect? The words are satisfied by holding that all that was intended was that, if a submission to arbitration is entered into, the sub-section prevents either party from revoking it, and there is no necessity for the suggested implication. We are left, therefore, to the remedies given by s. 150.

The case of *West* v. *Downman* (1) dealt with the Act from this point of view. There is an arbitration clause, but that clause does not give power to go to arbitration to fix the liability, but only to fix the amount. The Court held that such a liability was not a debt provable in an administration action.

(1) 14 Ch. D. 111.

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Lord Esher M.R.

It did not amount to a debt, and could not be proved at law as a debt, and, therefore, could not be proved in bankruptcy. In other words, it was held that the liability did not create between the parties the position of debtor and creditor. If that is so, the arbitrator cannot impose a liability as between debtor and creditor. He has no jurisdiction to impose a liability which does not exist. So that the real meaning of that decision is that, where the amount is above 50*l.*, the only remedy is to go before justices. In that case the local authority had not gone before justices within six months, and their power to do so had lapsed, and their only remedy was gone. That case seems to me to govern the present; and we must say—or, at all events, I say—that the master and the judge were right in declining to make an order to enforce this award because it was not, so far as the question of liability is concerned, an enforceable award, and the only remedy was to go before the magistrates to recover the amount in a summary way.

I think the appeal should be dismissed.

A. L. SMITH L.J. I come also to the conclusion that the order appealed from is right. In this case the local board of Willesden gave notice to the respondent amongst others to pave, sewer, and level a street. He did not comply with the notice; whereupon they did the work themselves, and under s. 150 they claimed from the respondent for the expenses apportionable to his frontage. He disputed the claim, as he was entitled to do; and an arbitrator was called in under the section, who made his award as long ago as September 23, 1893, and awarded that the amount apportionable to the respondent was 175*l.*

That the 175*l.* is now a fixed amount which cannot again be disputed, I do not doubt, for an arbitrator appointed under s. 150 is not to determine when a dispute arises anything other than the amount at which the liability is to be assessed. See *Sandgate District Local Board of Health* v. *Keene*. (1) The arbitration settled nothing more than that 175*l.* is the money amount—the proportion to be borne by the owner.

(1) [1892] 1 Q. B. 831, at p. 835.

Now what has been sought to be done in this case? The arbitrator having only jurisdiction to determine the point as to amount, the Willesden Local Board ask this Court, as they have asked the master and the judge, to enter up judgment for this amount upon the award under s. 12 of the Arbitration Act, 1889, which enacts that "an award on a submission may by leave of a Court or a judge be enforced in the same manner as a judgment or order to the same effect." In other words, the amount and the amount only having been adjudicated upon, the Court below was asked and we are asked to make an order, which has the same effect as a judgment, that the respondent should pay that amount to the Willesden Local Board, and be shut out from any defences which he may have on the ground, for instance, that he is not a frontager, or that it is a highway repairable by the inhabitants at large, or that it was not a street to which s. 150 is applicable, or any other defence which may be open to him. The first point I take is that the learned Baron and the master were right in saying that this award does not come within s. 12 of the Arbitration Act, 1889. I read that section, coupled with s. 24 of the same Act, to mean that where an award has definitely settled the rights and liabilities of the parties so that they cannot be further litigated, in such a case either party may ask, under s. 12, that judgment may issue on the award. Where there has been nothing more than a quantum or amount adjudicated upon, and no adjudication as to the liability of the person who is called upon to pay the amount, in my judgment the section does not apply.

Something has been said as to whether an action can be brought in the High Court. I do not think that question arises in this case; but I agree with what has been said by the Master of the Rolls. I think that point has been decided in *West* v. *Downman* (1) and in *Tottenham Local Board* v. *Rowell* (2), where James L.J. and Mellish L.J. held that in the county court the six months' limit, by s. 11 of 11 & 12 Vict. c. 43, applied as it would in a case before justices. Those cases are strong to shew that an action for the amount awarded, or an action for the amount expended by a local authority,

(1) 14 Ch. D. 111. (2) 1 Ex. D. 514.

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A. L. Smith L.J.

cannot be maintained in the High Court, but that the remedy which the local authority has for recovering those expenses is by an application to the summary jurisdiction of justices, which application must be made within six months.

I am of opinion that the award in this case is not one which comes within s. 12 of the Arbitration Act, 1889, and that it cannot be enforced summarily under that section. For these reasons I think the appeal fails.

Appeal dismissed.

Solicitor for local board: *W. G. Greig.*
Solicitor for Wright: *Edward Huelin.*

A. M.

1896
June 27;
Aug. 5.

JONES *v.* GERMAN.

Justices—Search-warrant—Information, Sufficiency of—Legality of Warrant.

A search-warrant may be issued on an allegation of reasonable suspicion of larceny.

On an application to a justice of the peace for a search-warrant, the sworn information upon which the application was made stated that the informant "hath just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to (the informant), and that he has requested the said W. J. to allow him to search several boxes which the said W. J. has had packed ready to be taken away, and which he refuses to be looked through." The justice issued his warrant, which was executed. In an action of trespass alleging that the information was insufficient and that the warrant was consequently illegal and without jurisdiction:—

Held, that it is not necessary in such an information to allege that a larceny has in fact been committed, but that it is enough to allege a suspicion that a larceny has been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected certain property of his to have been stolen; and that it was sufficient to give the justice jurisdiction.

FURTHER CONSIDERATION before Lord Russell of Killowen C.J. after a trial by a jury.

The plaintiff, William Jones, was in June, 1895, and for some years previously had been, in the employment of one Thomas Wood as butler at Brasted, near Sevenoaks. About Easter, 1895,

Mr. Wood gave the plaintiff notice to quit. In June, 1895, Mr. Wood found that the plaintiff had several boxes packed ready for removal, and in consequence of information which he received he requested the plaintiff to allow him to examine the contents of the boxes, which the plaintiff refused to do. Mr. Wood then went before the defendant, who is a justice of the peace for the county of Kent, and applied for a search-warrant. The sworn information on which he made the application was in the following form: "Be it remembered that . . . . Thomas Wood . . . . on oath maketh complaint that he hath just and reasonable cause to suspect and doth suspect that William Jones of Brasted has in his possession certain property belonging to the said Thomas Wood, and upon his oath doth depose and say that the said William Jones has been in his employ for five years and is now under notice to quit, and that he has requested the said William Jones to allow him to search several boxes which he the said William Jones has had packed ready to be taken away, but which he refuses to be looked through." The defendant thereupon issued his warrant to a constable authorizing him in the usual form to enter the premises occupied by William Jones and search for the goods, and ordering him, if the same or any part thereof should be found on such search, to bring the goods so found and also the body of William Jones before some justice of the county to be dealt with according to law. The constable then made a search in the plaintiff's boxes in the presence of Mr. Wood, who identified a number of articles as his property. The constable then arrested the plaintiff on a charge of stealing the articles so identified; and the plaintiff was eventually committed for trial at the quarter sessions. In the course of the trial Mr. Wood, the prosecutor, withdrew from the prosecution, and the plaintiff was discharged. The plaintiff then brought this action for trespass to goods and for false imprisonment, alleging that the information upon which the search-warrant was grounded was insufficient, and that the defendant in so issuing the warrant acted illegally and without jurisdiction. The defendant pleaded that the warrant was good both at common law and also under s. 103 of the Larceny Act (24 & 25 Vict. c. 96). The jury assessed the damages at

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JONES v. GERMAN.

15*l.* if the defendant was liable only for the trespass to the goods, and at 75*l.* if he was also liable for the arrest and imprisonment. The question of liability was reserved for further consideration.

Lawson Walton, Q.C., and *A. Gill*, for the plaintiff. The search-warrant was issued without jurisdiction, for the information did not aver that any larceny had been committed. It is laid down in Hale's Pleas of the Crown, vol. ii. p. 150, that such warrants "are not to be granted without oath made before the justice of a felony committed." And in *Entick* v. *Carrington* (1) Lord Camden C.J. says the same thing—"there must be a full charge upon oath of a theft committed." And the forms of search-warrant that have been commonly in use from at least the middle of the last century (see Burn's Justice of the Peace, ed. 1756, p. 621) down to the present day have invariably recited that an information has been made before the justice that "the following goods to wit . . . . have been feloniously taken, stolen, and carried away, &c."

[LORD RUSSELL of KILLOWEN C.J. referred to *Elsee* v. *Smith* (2) as shewing that a positive oath that a felony has been actually committed is not necessary, and that it is enough to state that the informant has reason to suspect that his property has been stolen.]

But assuming that to be the law, the information in the present case does not allege even any suspicion of larceny: it does not suggest the commission of any crime at all. It is quite consistent with the language of the information that the owner did not intend to suggest anything more than a seizure by the plaintiff of goods of which the title was in dispute. Further, the information was bad in not specifying the particular goods to be searched for. The form of warrant in Burn's Justice shews that it is necessary to do so. The present warrant is open to the objection that it is a general warrant.

Carson, Q.C., and *Hohler*, for the defendant. It is admitted that the validity of the warrant must depend upon the question whether the information can by reasonable intendment be said

(1) 19 Howell's State Trials, 1030, at p. 1067. (2) 1 D. & R. 97.

to aver a suspicion of larceny. But the information in the present case does so. If this were an action of libel, complaining that the information conveyed an imputation of a criminal offence, it could not be contended that there was not evidence to go to the jury of such an imputation. The objection that the information and warrant do not contain a specific enumeration of the goods is ill-founded. The form in Burn's Justice is not exhaustive. It only deals with the most usual case, in which the owner knows what has been stolen. A person may own property which he has never seen, and yet may receive information that leads him to suspect that some of it has been stolen. If then he could not aver generally that he suspected "certain property" of his to have been stolen, a felony might go undetected. In any view, the plaintiff cannot recover more than the 15*l.* for trespass to the goods. The magistrate cannot be liable for the arrest; for, the owner having identified the goods, it would be the constable's duty at common law to arrest the plaintiff, wholly apart from the order contained in the warrant.

Walton, Q.C., in reply. There is no analogy between an information and a libel. It is not permissible to read an innuendo into an information, any more than into an indictment or any other criminal pleading. To destroy the generality of the warrant it is essential to name the specific goods. In *Wilkes* v. *Wood* (1) it was held that a warrant cannot be general as to place. It is equally important that it should not be general as to goods.

Cur. adv. vult.

Aug. 5. LORD RUSSELL of KILLOWEN C.J. This was an action for illegal arrest, false imprisonment, and trespass to goods. The plaintiff was, at the times material in the action, employed as butler and bailiff to one Thomas Wood at Brasted in Kent. The defendant is a justice of the peace for the county of Kent. On June 8, 1895, Thomas Wood swore an information before the defendant that "he hath just and reasonable cause to suspect and doth suspect that William Jones of Brasted has in his possession certain property belonging to the

(1) 19 Howell's State Trials, 1153.

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said Thomas Wood," who "upon his oath doth depose and say that the said William Jones has been in his employ for five years and is now under notice to quit, and that he has requested the said William Jones to allow him to search several boxes which he the said William Jones has had packed ready to be taken away, but which he refuses to be looked through." On the same day the defendant granted a search-warrant for the said goods, authorizing the constable of the parish of Sevenoaks "with proper assistance to enter the said premises occupied by the said William Jones in the daytime, and there diligently search for the said goods, and if the same or any part thereof shall be found upon such search, that you bring the goods so found and also the body of the said William Jones before me, or some other of Her Majesty's justices of the peace in and for the said county of Kent, to be disposed of and dealt with according to law." In pursuance of the warrant a search for the property of Thomas Wood was made in the presence of the plaintiff and Thomas Wood; and Thomas Wood then identified and claimed as his property certain articles, all of which articles were found packed in the boxes of the plaintiff; and the plaintiff was therefore charged by Thomas Wood with stealing them, and taken into custody. Subsequently the plaintiff was in due course of law charged before the defendant with stealing the said goods, and was committed for trial at the quarter sessions, and the grand jury returned a true bill. Subsequently it was agreed between the plaintiff and Thomas Wood that, in consideration of Thomas Wood not offering any evidence against the plaintiff, the articles should be given up to Thomas Wood, and that the plaintiff would take no proceedings for false imprisonment or malicious prosecution against Thomas Wood. In pursuance of the terms of this agreement no evidence was offered on the part of the prosecution, and a verdict of not guilty was returned. The plaintiff then brought the present action against the defendant, alleging that the warrant was granted illegally and without jurisdiction because the information did not charge the commission of any criminal offence, and did not specify the goods for which search was desired. The jury assessed the plaintiff's damages at 15*l.* if the defendant

was liable only in respect of the search, and 75*l.* if he was liable for the arrest and imprisonment until committal for trial, subject, however, to the question which was subsequently argued before me, whether the defendant was liable at all.

I will deal with these two objections in the above-mentioned order. Now, it seems clear that at common law a justice has the general power to issue a search-warrant for stolen goods (see Hale's Pleas of the Crown, vol. ii. pp. 113, 149, 150; *Entick* v. *Carrington* (1); Burn's Justice of the Peace, 30th ed. vol. v. p. 1180); and although the earlier authorities are not clear on the subject, it was expressly decided by a strong Court in *Elsee* v. *Smith* (2) that an allegation of the actual commission of a felony is not necessary to justify a magistrate in granting a search-warrant. Abbott C.J., in giving judgment in that case, said: "It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search-warrant. Suppose the case of a horse, which has been lost by its owner, and is found in the possession of another person, the owner in that case might not like to take upon himself to swear that the horse has been stolen, for it may have strayed, but when he finds that his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment, and therefore he may conscientiously swear that he suspects it to have been stolen. If under such circumstances, the magistrate is not authorized in issuing his search-warrant, it might happen in many cases that felonies would go undetected." It seems to me, therefore, that, on this part of the case, the question is whether the information can be fairly understood as alleging reasonable grounds for suspecting that the goods were being feloniously dealt with by the defendant. I think it can. Supposing (to take the illustration put by the defendant's counsel) the same language to be the subject of an action of libel, with the innuendo suggested, it would be, in my judgment, wrong to

(1) 19 Howell's State Trials, at p. 1067. (2) 1 D. & R. 97.

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rule that the words complained of were not capable of bearing that innuendo. But it is said that this warrant is granted under s. 103 of 24 & 25 Vict. c. 96, which says: "If any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either upon indictment or upon summary conviction by virtue of this Act shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods." I greatly doubt whether this section applies to stolen goods, and, at any rate, I do not think it was meant to alter the law in respect of search-warrants for goods supposed to have been stolen. The language of the section suggests to my mind that its object is to apply the practice as regards search-warrants for stolen goods to goods in respect of which some offence under the Act (other than larceny) has been committed. The conclusion, therefore, that I have come to on this point is that, on the authority of the case of *Elsee* v. *Smith* (1), the information was good at common law, and was sufficient to justify the warrant.

The second objection taken is that the information should have specified the goods for which search was desired, and that the warrant was a general warrant because it did not specify the goods; and that it was therefore bad. As to this, I cannot find it anywhere laid down that a search-warrant must specify the goods; and, indeed, it is easy to suggest many cases where it might be impossible for the person laying the information to do so. Probably, in most cases, there is no difficulty in the matter, and for that reason the usual forms for the information and the warrant are drawn up in that way.

I think, therefore, both objections fail, and my judgment is for the defendant.

Judgment for defendant.

Solicitor for plaintiff: *C. Everett.*

Solicitors for defendant: *Routh, Stacey & Castle, for Knocker, Knocker & Holcroft, Sevenoaks.*

(1) 1 D. & R. 97.

J. F. C.

THE QUEEN *v.* JAMESON AND OTHERS.

1896
July 20, 21.

Criminal Law—Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90)—*Area of Operation of Act—Pleading.*

By s. 11 of the Foreign Enlistment Act, 1870, "If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue: (1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence":—

Held, that, if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions.

By s. 2 of the said Act, "This Act shall extend to all the dominions of Her Majesty." And by s. 3, "This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation."

An indictment alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,'" certain offences against the said Act were committed:—

Held, that the indictment sufficiently alleged the Act to have been in operation in that part of Her Majesty's dominions in which the alleged offences were committed.

MOTION to quash an indictment.

An indictment framed under s. 11 of the Foreign Enlistment Act, 1870, alleged in the first count that the defendants "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, were unlawfully engaged in the preparation of a military expedition to proceed against the dominions of a certain friendly State—to wit, the South African Republic." The remaining counts alleged a variety of offences against the said section, in each case alleging that the preparation or fitting out of the expedition was "within the limits of Her Majesty's dominions and

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after the coming into operation therein of the Act." The ninth count alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, a military expedition was prepared to proceed against the dominions of a certain friendly State—to wit, the South African Republic; and that (the defendants), after the coming into operation of the said Act, and without the licence of Her Majesty, unlawfully did assist in the preparation of such military expedition." The subsequent counts were variations of the ninth count.

Sir Edward Clarke, Q.C. (*Sir Frank Lockwood, Q.C., Carson, Q.C., C. F. Gill, Alfred Lyttelton, J. P. Wallis, Roskill,* and *H. Spensley* with him), for the defendants. The indictment is bad, for none of the counts contain any allegation that the Foreign Enlistment Act was in force in that part of the Queen's dominions in which the illegal expedition was prepared. The word "therein" is ambiguous, and might mean that the Act was in force in some other part of the dominions. Further, if the Crown intends to rely on a preparation in a British possession, there is no averment that the Act was duly proclaimed in such possession. But it is a rule of criminal procedure that every fact which constitutes the offence shall be stated in the indictment. The pleading must aver facts, not conclusions of law. In Hawkins' Pleas of the Crown, Bk. II. c. xxv. s. 60, it is laid down that "in an indictment nothing material shall be taken by intendment or implication." In *Rex* v. *Woolcock* (1), on an indictment under the Riot Act for a felony in remaining together one hour after the making of proclamation, it appeared that the words of the proclamation as contained in the book from which it was read differed from the statement of the proclamation in a certain count of the indictment by containing the additional words "of the reign of." It was held to be a variance. In *Rex* v. *Everett* (2) an information for unlawfully soliciting a custom-house officer to neglect his duty stated that dutiable goods were about to be

(1) 5 C. & P. 516. (2) 8 B. & C. 114.

imported, that the person solicited was a custom-house officer, and that it was his duty as such officer to seize and detain all such goods as on importation would be forfeited to the King. The information was held bad on the ground that it was not the duty of every custom-house officer to seize smuggled goods, and that the averment that it was the particular officer's duty was insufficient without shewing the special facts from which that duty arose. Here the proclamation of the Act is a material part of the offence: *Reg.* v. *Otway* (1); *Walsh* v. *Reg.* (2) But even if the indictment is not bad as a whole, the ninth and subsequent counts are bad, inasmuch as they do not allege that the assistance rendered by the defendants to the other persons engaged in preparing the expedition was rendered within the limits of the Queen's dominions. The Act does not apply s. 11, under which the indictment is framed, outside the dominions even to British subjects. Every Act is primâ facie to be read as only applying within the dominions: *Rosseter* v. *Cahlman.* (3) Even if there were no sections in the Act applying in terms to British subjects outside the dominions, s. 11, being silent on the subject, ought to be read as not so applying. But the presumption that it was not intended to apply outside the dominions is strengthened by the fact that there are other sections—e.g., ss. 4, 5—which expressly provide that the Act shall apply to certain specified acts done by British subjects outside. Further, if the Act is to be applied to British subjects outside the dominions, there is no averment that the defendants are British subjects.

Sir R. Webster, A.-G., and *Sir R. B. Finlay, S.-G.* (*H. Sutton, C. Mathews, Avory*, and *J. F. Rawlinson* with them), for the Crown. The indictment sufficiently avers that the Act came into force within the limits of Her Majesty's dominions so far as is material for the purposes of the indictment—that is to say, within the place where the Acts complained of were committed. A distinction is to be drawn between matters of inducement and matters which are the gist of the offence. The former (under which head comes the fact of the statute being

(1) 1 Ir. C. L. R. 69. (2) 22 L. R. Ir. 314.
(3) 22 L. J. (Ex.) 128.

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in operation in the particular place) may be stated generally: *Reg.* v. *Bidwell.* (1) The case of *Rex* v. *Everett* (2) belongs to the latter class. There the duty alleged was a special duty lying on the particular custom-house officer, and it was necessary to shew how it arose. Here the duty, the breach of which is complained of, is a duty resting on all persons alike. The objections to the ninth and subsequent counts are equally untenable. If there has been an illegal preparation of an expedition within the dominions, the offence of assisting may be committed outside the dominions, at all events by British subjects. Sub-s. 1 of s. 11 purposely omits the words "within the limits of Her Majesty's dominions," for to have inserted them would have tended to defeat the object of the Act. The omission to aver that the defendants are British subjects is not an objection that can be taken to the indictment.

Sir Edward Clarke, Q.C., in reply.

LORD RUSSELL of KILLOWEN C.J. This is an application made on behalf of the defendants to quash the indictment, or in the alternative to quash certain counts of the indictment. Such an application is one the granting of which is within certain limits in the discretion of the Court. If the Court should be of opinion that the indictment is clearly bad, or that any counts in it are clearly bad, it would be the duty of the Court to quash the one or the other, as the case might be. If the matter were one of doubt, and if the language of the indictment, or of certain counts in it, were such as to cause embarrassment to the defendants in their defence and to prejudice the fair trial of the case, then the Court would have discretion to quash the indictment, or such counts of it as might be necessary. We have, however, come to the conclusion that none of the objections which have been raised in this case, either to the indictment as a whole or to any of the counts in it, are sufficient to justify us in quashing either the one or the other.

The first objection which was taken was one which went to the whole indictment—that is to say, if it were a good objection to the first count, with reference to which it was argued, it

(1) 1 Den. C. C. 222. (2) 8 B. & C. 114.

would equally be a good objection to the remaining counts. The count in question is, so far as is material, in the following terms: it charges that the defendants "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,' and without the licence of Her Majesty, were unlawfully engaged in the preparation of a military expedition to proceed against the dominions of a certain friendly State." By s. 2 of that Act it is provided that the Act shall extend to all the dominions of Her Majesty; and by s. 3 it is provided that the Act shall come into operation in the United Kingdom immediately on the passing thereof, and in the several British possessions outside the United Kingdom on proclamation thereof in such possessions in the manner provided by that section. And it was argued that the words "after the coming into operation therein" were ambiguous, and that the count was bad as not containing a distinct averment that the Act was in force in that part of Her Majesty's dominions in which the unlawful preparation of the expedition was alleged to have been made. But even in considering the question of the validity of a criminal pleading one must have some regard to the ordinary interpretation of language, and apply some measure of common sense to its construction; and applying that test I cannot doubt that the count states reasonably and intelligibly that the defendants, in a place within Her Majesty's dominions and in which the Act of 1870 was in operation, were engaged in the preparation of an expedition which would be an offence against the Act. That is what the prosecution must prove in fact. They must prove, not that the Act was in force in some part of the dominions of the Crown, but that it was in force in *the* part in which the illegal preparation took place. Then it was further argued that if the prosecution intend to rely on a preparation of the expedition in a British possession outside the United Kingdom, inasmuch as s. 3 says that the Act shall not come into force in such British possession until after it has been duly proclaimed there, the count ought to have averred that the Act had been duly proclaimed in the place where the illegal preparation was made, and for want of such

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averment is bad. But that objection is not, in my opinion, one that can be taken to the count. If in the result it be necessary, in order to shew that the Act was in operation in the place where the expedition was prepared, to prove that the Act was duly proclaimed there, failure on the part of the Crown to prove such proclamation will be fatal. But it is not a matter that need be averred in the indictment. It is enough for the purposes of the indictment to allege that the Act was in fact in operation in the place in question. I pass on to the objections taken to the ninth and subsequent counts, which I may deal with briefly. But first I should like to make some observations with regard to the rules of construction applicable to statutes such as this. It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules—for instance, if there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom. But whether it be confined in its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory. Now apply those considerations to the present case. Sect. 2 provides that "This Act shall extend to all the dominions of Her Majesty." Therefore the preparations mentioned in s. 11, under which this indictment is framed, are preparations made either by subjects of the Queen or by foreigners in any

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part of the Queen's dominions. And it also seems clear that the provisions of that section were intended to apply to subjects of the Queen wherever they might be, for we must consider the mischief that was aimed at by the Act. I think the objections raised to the ninth and subsequent counts were based on a construction of the statute, both as to the area of its operation and as to the class of persons to whom it is applied, with which I cannot agree. It is no doubt clear that in order to bring a case within s. 11 there must have been a preparation in the Queen's dominions; but I think that, when you have got that fact established, there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which will amount to an offence against the Act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty. But then it was argued that these counts contain no averment that the defendants are British subjects. In my judgment that averment is not necessary. If in the course of the trial it turns out that any of the defendants are foreigners, every opportunity will be given to their counsel to take that objection, and to give legal effect to any defence attributable to that fact.

We have not thought it necessary to go through, though we have considered, the various cases that have been cited. Many of them belong to a time when the right and justice and substance of the thing were sacrificed to the science of artificial statement. By some of the cases that have been cited we should not consider ourselves bound, but we arrive at the conclusion that none of them throw any real light on the question we have here to consider. None of them lay down any canon applicable to the present case. The result, therefore, will be that the application to quash the indictment as a whole or to quash certain counts in it will be refused.

POLLOCK B. and HAWKINS J. concurred. (1)

Application refused.

Solicitor for Crown: *Solicitor to the Treasury.*
Solicitor for defendants: *Hollams & Co.*

(1) The defendants were tried at Bar.

J. F. C.

C. A.
1896
July 15.

[IN THE COURT OF APPEAL.]

MILES *v.* GREAT WESTERN RAILWAY COMPANY.

Lands Clauses Acts—Compensation—Land compulsorily taken—Costs of Arbitration—Offer made by Company—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.

A railway company seeking to acquire land under the provisions of the Lands Clauses Consolidation Act, 1845, an arbitration took place under that Act to determine the amount of compensation to be paid by them to the owner of the land. The company had previously made an offer of the sum of 11,000*l.* Part of the landowner's claim was in respect of damage that would be caused to the residue of his land, which was building land, by cutting it off from the natural outfall for its drainage. When the parties came before the arbitrator, it was agreed between them that a right should be reserved to the landowner of making a sewer, for the purpose of draining his land, under the railway and land of the company; and consequently no claim in respect of such damage as before mentioned was ultimately submitted to the arbitrator. The arbitrator awarded the sum of 10,029*l.* to the landowner:—

Held that, although the sum awarded was less than the amount of the company's offer, the company were liable under s. 34 of the Lands Clauses Consolidation Act, 1845, to pay the costs of the arbitration to the landowner on the ground that the award was not in respect of the same subject-matter as that in respect of which the offer was made.

APPEAL from the judgment of a Divisional Court (Pollock B. and Bruce J.) upon a special case stated by consent pursuant to Order XXXIV., r. 1.

The defendants on August 1, 1893, gave to the plaintiff a notice to treat under the Lands Clauses Consolidation Act in respect of certain land of which the plaintiff was the owner. The plaintiff on March 9, 1894, gave notice to the defendants of his estate and interest in the land sought to be taken, and that he claimed 20,808*l.* for the purchase of his estate and interest in the land, and for compensation for injury by severance and other damage which would be sustained by him by reason of the execution of the works authorized by the defendants' special Act. The plaintiff and the defendants being unable to agree as to the amount of the purchase-money and

compensation to be paid by the defendants, the plaintiff gave a notice dated May 22, 1894, to the defendants that it was his desire that the amount should be settled by arbitration in manner provided by the Lands Clauses Consolidation Act, 1845, and appointed an arbitrator. The defendants, by writing dated June 8, 1894, offered to the plaintiff the sum of 11,000*l.* for the purchase of his estate and interest, and for compensation which he might be entitled to be paid by reason of damage, injury, or loss, if any, which he might sustain by reason of the taking of his land or the exercise of the powers of the special Act. On June 9, 1894, the defendants gave notice to the plaintiff of the appointment of an arbitrator by them. Ultimately, however, it was agreed that a sole arbitrator should be appointed in the matter, and one was accordingly appointed. The land of the plaintiff which the defendants sought to take was situated between the Bristol Channel and other land of the plaintiff, which was being developed as building land, and part of the plaintiff's claim was in respect of damage which would be caused to such other land by his being rendered unable to construct a drain or sewer to the Bristol Channel, which was the natural outfall for the drainage therefrom. When the parties appeared before the arbitrator it was agreed, in the course of the inquiry, that an alteration should be made in respect of the matters referred in the arbitration, and that the defendants should afford all reasonable facilities to the plaintiff to construct a sewer, if at any time he should so require, under the railway and lands of the defendants. This alteration was embodied in a memorandum signed by the counsel for the plaintiff and the defendants for the purpose of being incorporated in the award of the arbitrator, and it was so incorporated. By this memorandum, which was drawn in the form of recitals to be prefixed to the award, it was stated that it had been agreed between the parties that, if at any time the plaintiff should require to construct a sewer for the purpose of carrying the sewage of his estate on the east side of the lands taken to an outfall on the west or river side of them, the company should afford all reasonable facilities for carrying such sewer and works under the railway and land purchased

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by the company, such sewer to be constructed under the direction and to the satisfaction of the company's engineer: and that it had been further agreed that, in consideration of the plaintiff's making no claim for severance, the company would purchase two pieces of land not included in the notice to treat together with certain land then in the course of accretion outside the lands comprised in the notice to treat, and all the rights of foreshore of the owner of such land at a price to be separately assessed by the arbitrator. It was further stated by the memorandum that by error the notice to treat had included certain pieces of land not the property of the plaintiff, and the plan attached thereto was inaccurate, and that it had been agreed that the plan annexed to the award should be substituted for the said plan on the notice to treat. It formed no part of the memorandum that the formal offer aforesaid should or should not be deemed to be withdrawn. The arbitrator made his award on February 8, 1895, including therein the matters mentioned in the memorandum, and determined that the defendants should pay to the plaintiff the sum of 10,029*l.* in respect of the purchase-money of the land taken and compensation for damage, and the sum of 215*l.* for the purchase-money and compensation in respect of the land in the course of accretion as aforesaid and the rights of foreshore, and that there should be reserved to the plaintiff a right to make a sewer under the railway and lands of the company as before mentioned. A conveyance of the land had been executed, and the sum awarded had been paid. The plaintiff claimed from the defendants payment of the costs incurred by him in and about the arbitration, but the defendants refused to pay them. The question for the Court was whether the defendants were liable to pay the plaintiff the costs of and incidental to the arbitration and award. The Divisional Court gave judgment for the plaintiff.

A. T. Lawrence, for the defendants. The plaintiff, having been awarded a sum less than the defendants' offer, is not entitled to costs under s. 34 of the Lands Clauses Consolidation Act, 1845. The plaintiff cannot recover the costs of the arbitration unless he is entitled to do so under s. 34, as the sub-

mission and award do not provide for them. An alteration of the subject-matter of the arbitration does not necessarily do away with the offer. If it did, the company could not agree to the most trifling alteration, which would be an unreasonable result. Further, it is contended that either the subject-matter of the arbitration was not altered for this purpose by what took place before the arbitrator, and the offer made by the company remained effective, or, if the subject-matter of the arbitration was altered from that which it had been originally, then it follows that the arbitration cannot be considered as having taken place under the Lands Clauses Consolidation Act at all, but must be treated as an arbitration by agreement of the parties outside that statute, and so s. 34 could not apply. That section refers to "such arbitration"—that is to say, the arbitration on the subject-matter of the notice to treat and claim.

[The Court intimated their opinion that the arbitration must, under the circumstances, be considered as one under the Lands Clauses Consolidation Act.]

The plaintiff never had any claim for compensation on the ground that the residue of his land was cut off from the Bristol Channel, for he could have got power to construct any additional accommodation work that might be necessary by order of two justices under s. 71 of the Railways Clauses Consolidation Act, 1845. Therefore, the arbitrator could not have awarded compensation in respect of the alleged damage, and the withdrawal of that part of the claim did not really alter the subject-matter of the arbitration.

R. M. Bray, and *T. Willes Chitty*, for the plaintiff. It is obvious that the damage which would be done to the residue of the plaintiff's land by cutting it off from its natural drainage outfall would be most serious, and, if this had not been withdrawn from the arbitrator, the award would have been much larger. It would be most unfair that the offer should be considered as standing under those circumstances. It was impossible for the plaintiff to obtain the means of such drainage as he required as additional accommodation works by order of two justices under s. 71 of the Railways Clauses Consolidation

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Act, 1845, because the only additional accommodation works that can be obtained under that section are such as are necessary for the enjoyment of the residue of the land in its existing state. The subject-matter of the award did not include the whole of that in respect of which the offer was made. The offer, therefore, was gone.

A. T. Lawrence, in reply.

LORD ESHER M.R. The question is whether this case comes within the first part of s. 34 of the Lands Clauses Consolidation Act, 1845, or the second part. By virtue of the first part of the section all the costs of the arbitration are to be borne by the promoters of the undertaking, unless the case falls within the second part—that is to say, unless the arbitrators shall award a sum the same as or less than shall have been offered by the promoters of the undertaking, in which case each party is to bear his own costs incident to the arbitration, and the costs of the arbitrators are to be borne by the parties in equal proportions. I agree with Bruce J. in the Court below in thinking that the words of the section must be construed as meaning that the award must relate to the same subject-matter as the offer, and that, if it does not, the case cannot come within the exception contained in the second part of the section. It is therefore necessary to consider whether in this case the award has been made in relation to the same subject-matter as the offer. The plaintiff was claiming the value of the land which the defendants required to take and compensation for the injury which would be done to his back land by making the railway and cutting off his access to the Bristol Channel, so that he would be prevented from draining that land into it. That was the state of things when the defendants made an offer in respect of the plaintiff's claim. That offer was, therefore, made in respect of the value of the land and the compensation claimed for the injury which I have mentioned. When the parties came before the arbitrator, it was agreed that the plaintiff's claim should be reduced. The defendants conceded to him power to make the necessary drain into the Bristol Channel, and so obviated the damage which would

otherwise have been occasioned to the plaintiff's back land. So the question that came before the arbitrator was only as to the value of the land taken, which was of course less than the value of the land plus compensation for that damage. Having regard to the sum actually awarded, it seems clear that, if the original claim had come before him, the arbitrator would have awarded a sum in excess of the amount offered. Again, the railway company would no doubt have offered less than they did, if the value of the land alone had been the original subject-matter of the claim. It seems to me clear that the offer was not made in respect of the same subject-matter as that which ultimately was submitted to the arbitrator and was the subject-matter of the award. Therefore the case comes within the first part of s. 34 and not the second. The judgment of the Divisional Court was, in my opinion, correct, and the appeal fails.

A. L. SMITH L.J. I arrive at the conclusion that the judgment of the Divisional Court was right and must stand. The defendants were proposing to take part of the plaintiff's land so as to cut off the residue of it from the Bristol Channel. The effect of that would have been to prevent the plaintiff from draining the residue of his land into the Bristol Channel, and consequently to diminish its value. Under those circumstances the plaintiff was claiming 20,808*l.* as the value of the land to be taken and compensation in respect of that damage to the residue. Thereupon the defendants made an offer of the sum of 11,000*l.*; and so the matter rested when the case went to arbitration. I am clearly of opinion that this was from beginning to end an arbitration under the Lands Clauses Consolidation Act. When the case came before the arbitrator, the defendants agreed to allow the plaintiff to make a sewer through the land taken so that the plaintiff's back land should not be injured. In my judgment, that was an important alteration of the subject-matter of the arbitration. The original claim was in respect of land of the plaintiff to be taken without the reservation of any power of draining the plaintiff's back land into the Bristol Channel. The award was in respect of land to be taken with a reservation of that power. The award was therefore

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made in respect of a subject-matter substantially different from that in respect of which the offer was made. I therefore agree that the case comes within the first and not the second part of the section, for the award does not relate to the same subject-matter as the offer.

RIGBY L.J. I am of the same opinion. In the first place, I consider that this was an arbitration under the Lands Clauses Consolidation Act. I think that is clear from the terms of the recitals in the memorandum signed by counsel which were embodied in the award, and which appear to me carefully to provide for treating the arbitration as one under the company's notice to treat. That being so, I do not think the question under s. 34 admits of doubt. By that section the costs of the arbitration are to be borne by the promoters of the undertaking unless the arbitrators award a sum the same as or less than shall have been offered by the promoters. That obviously means "offered for that which is the subject-matter of the award." In respect of what was the offer made here? Clearly it was made in respect of the value of the land and all damage which would be sustained by reason of the execution of the works. If the award had been in respect of the same subject-matter, the defendants would not have been liable to pay the plaintiff's costs. But by the agreement made before the arbitrator the subject-matter of the award was substantially altered; and I cannot think that it would be right for the purposes of s. 34 to treat the defendants' offer which was made for one thing as having been made for a wholly different thing. It was uncertain whether the plaintiff could have got an order for the making of a sewer under the railway from justices; and it is obvious that serious injury would have been occasioned to him if he had not been given the power of making such a sewer. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Torr, Gribble, Oddie & Sinclair, for Osborne, Ward, Vassall & Co., Bristol.*

Solicitor for defendants: *R. R. Nelson.*

E. L.

[IN THE COURT OF APPEAL.]

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Aug 4.

In the matter of an Arbitration between E. GONTY and THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

Lands Clauses Acts—Compensation—Railway Company—Statutory Right to take Portion of Property—Exception if "Material Detriment" to Remainder—Access over Land taken—Power of Company to grant Right of Way—Arbitration—Power of Arbitrator to consider Sufficiency of Access—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 92—*Special Case stated by Arbitrator—Costs in Court of Appeal—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 20.

A railway company, under their special Act, were entitled, notwithstanding s. 92 of the Lands Clauses Consolidation Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The company gave notice to treat for a portion of certain property, and, before the arbitrator appointed under the Lands Clauses Consolidation Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion taken. On a case stated by the arbitrator in his award:—

Held, that the arbitrator was entitled, in determining whether there would be "material detriment" to the remainder of the property arising from the taking of a portion, to take into consideration all the circumstances of the case, including the sufficiency of the proposed access:

Held, also, that as the giving the proposed right of way over the lands of the company was not inconsistent with the purposes for which the lands were taken, the company had power to grant it.

Mulliner v. *Midland Ry. Co.* (11 Ch. D. 611) commented on.

The Court of Appeal has power under the Arbitration Act, 1889, to deal with the costs of an appeal on an award stated in the form of a special case for the opinion of the Court.

In re Holliday and the Mayor of Wakefield (20 Q. B. D. 699) no longer applies in such a case.

Appeal from a judgment of a Divisional Court on a special case stated by an umpire in the form of an award.

The defendants, by virtue of the Manchester, Sheffield and Lincolnshire Railway Act, 1893 (56 & 57 Vict. c. lxxix.), and the public Acts incorporated therewith, were empowered to

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take, for the purposes of the railways and works authorized by their Act, certain lands and hereditaments in the borough of Leicester.

Sect. 42 of the company's Act enacts: "Notwithstanding s. 92 of the Lands Clauses Consolidation Act, 1845, the owners of and other persons interested in the houses or other buildings or manufactories described in the schedule to this Act and whereof parts only are required for the purposes of this Act may if such portions can, in the opinion of the jury, arbitrators, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto, be required to sell and convey to the company the portions only of the premises so required, without the company being obliged or compellable to purchase the whole or any greater portion thereof, the company paying for the portions required by them and making compensation for any damage, sustained by the owners thereof and other parties interested therein, by severance or otherwise. If for twenty-one days after the service of notice to sell and convey any portion or portions of the said properties, any owner or other person shall fail to notify to the company that he alleges such portion or portions cannot be severed from the remainder of the property without causing the material detriment mentioned, then the company may proceed to take such portion or portions only, but if within such twenty-one days he shall by notice to the company allege that such portion or portions cannot be severed from the remainder without causing such material detriment as aforesaid then the tribunal to whom the question of disputed compensation shall be submitted shall determine the matter of the said allegation in addition to the other questions required to be determined by them. . . ."

The landowner, E. Gonty, was possessed of dye-works within the borough of Leicester, and a part of the land on which the dye-works were situated was scheduled by the company, who gave notice to treat for the purchase thereof. The landowner gave a counter-notice that he was owner of the lands and hereditaments proposed to be taken, and of the adjoining lands,

dye-works, and hereditaments; and that the lands and hereditaments scheduled could not be severed from the adjoining lands, dye-works, and hereditaments without causing material detriment thereto; and that he required the company to take the whole of his lands and hereditaments. A dispute having arisen, it was referred to arbitration and an umpire appointed, who made his award in the form of a special case.

From the award it appeared that there was access to and from the dye-works to a public highway known as Bath Lane, and that if the company took the portion of land comprised in their notice to treat there would be no access for vehicles to and from the remainder of the land except over the land so taken by the company.

The railway was to be carried over the portion of land to be taken by the company by a viaduct, and a sufficient access between the remainder of the land and Bath Lane could be provided through an archway of the viaduct. The sole purpose for which the company would use or were likely to use the land taken was to carry the viaduct over which the lines of the company would pass, and, except for letting for non-railway purposes, the company were not likely to require any further or other use of the land.

The company contended that the provision of such access was an accommodation work which in the event of their taking the scheduled portion of the land they would be bound to make and maintain under s. 68 of the Railways Clauses Consolidation Act, 1845, and, whether they would or would not be so bound, they offered and undertook to make and at all times thereafter maintain, for the accommodation of the owners and occupiers of the remainder of the land, such an access to and from Bath Lane, by means of a roadway under one of the arches of the viaduct, of the full height and width of such arch, and to execute any assurance necessary to secure the owners a perpetual easement of such right of passage under the viaduct.

The landowner contended that, in determining under s. 42 of the company's Act whether the portions of the land could be severed from the remainder thereof without material detriment

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thereto, the umpire was bound to consider only the effect which the taking of the portion required by the company, and the severing of the same from the remainder, would have upon such remainder, and that he was not authorized by the Act to take into consideration any offers, whether of works, easements, or other matters, made by the company with the object of neutralizing such effect. The landowner further contended that the company could not in law fulfil their undertaking to convey the easement in perpetuity; and further, that even if such access were provided, there would still be material detriment to the rest of the property.

The umpire decided that—

(1.) If the taking of the land by the company under their notice to treat would prevent all access to the works, the company must purchase the entire property.

(2.) If the company had power to give the access offered through the archway, there would not be such material detriment to the property as to entitle the landowner to claim that the company must purchase the whole.

Believing that there was nothing to prevent the roadway offered by the company from being accepted by the landowner as a means of access, the umpire proposed to hear the parties on that basis as to the compensation to be paid by the company for the land scheduled, and for the damage sustained by the landowner in consequence of its being taken.

It was thereupon agreed that the umpire should make his award alternatively in respect of the taking of the land scheduled and of the whole of the land. The award was duly made in the alternative, and the question raised for the opinion of the Court was whether the umpire was entitled to take into consideration the access offered by the company in forming an opinion whether the portion of the land proposed to be taken could be severed from the remainder thereof without material detriment thereto.

The Divisional Court (Pollock B. and Bruce J.) gave judgment in favour of the landowner to the effect that the company were bound to take the whole of the land.

The railway company appealed.

Eldon Bankes (*C. A. Russell* with him), for the company, in support of the appeal. The land under the railway arches is not superfluous land: *Mulliner* v. *Midland Ry. Co.* (1); but it is land which they wish to use for the purposes of their undertaking in a manner not inconsistent with the purposes for which the company was constituted. The cases of *Grand Junction Canal Co.* v. *Petty* (2) and *Foster* v. *London, Chatham and Dover Ry. Co.* (3) shew that under such circumstances the company can give the proposed right of way, and the alienation is not ultra vires as in *Mulliner* v. *Midland Ry. Co.* (1) The umpire had, therefore, a right to consider the sufficiency of the proposed access in determining whether there was material detriment to the remainder of the property. The work is of such a nature that the company might be compelled to make it as an accommodation work under s. 68 of the Railways Clauses Consolidation Act, 1845.

Lawson Walton, Q.C., and *S. M. Everard*, for the claimant. It is submitted that such a work as is proposed is not an accommodation work; but whether it is or is not, the umpire had no right to consider it in determining the question of "material detriment" to the remainder of the property. The question which he had to determine was whether the severance itself was a material detriment. The question of degree was not one that he could entertain; and it is plain on the face of the award that he found that, but for the proposed access, there would be material detriment to the part of the property not taken. Further, the company have no power to alienate any portion of their land except for the purposes of their Act: *Mulliner* v. *Midland Ry. Co.* (1); and the granting of this right of way is not such a purpose.

C. A. Russell, in reply.

LORD ESHER M.R. Considering what was the law before the 42nd section of the special Act in this case was passed, and then looking at that section, I think that that section ought to be construed so as to meet that which was the grievance before.

(1) 11 Ch. D. 611. (2) 21 Q. B. D. 273.
(3) [1895] 1 Q. B. 711.

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Lord Esher M.R.

Previously, if a railway company took the smallest portion of a man's house, building, or manufactory, although it could do him no material detriment, nevertheless it was left to the option of the landowner to refuse to allow that bit to be taken without the whole being also taken. That was embodied in the 92nd section of the Lands Clauses Consolidation Act, 1845. Now, how was that grievance met? It seems to me that it was met, under certain circumstances, by taking away from the landowner the power to say that because a part of his manufactory is required the whole should be taken. It was meant to take away that power from him if certain conditions are fulfilled. Who is to say if those conditions are fulfilled or not? Not the landowner, but a tribunal—an arbitrator if it is sent to an arbitrator, or a jury if the matter is sent to a jury. It is, therefore, for the arbitrator or the jury to say whether, if a portion is taken, there will be material detriment to the remainder. If the tribunal determines that the part is going to be taken in such a manner that the taking is not materially detrimental to the remainder, then the power of the landowner under s. 92 is gone, and he cannot object to the company taking the part which they have given the proper notice to take.

Now, considering that it is meant to meet an acknowledged grievance, it seems to me that s. 42 of the special Act ought to be construed as largely as it reasonably can, to avoid that grievance. If that be so, then I think that the way to construe s. 42 is to say that the arbitrator or the jury, as the case may be, must have a right to consider all the circumstances and the mode and manner in which the property is to be taken. In such a case as this the landowner says that access to the part left to him will be cut off, and that so it will be detrimentally affected. The railway company admit that, if they take the land without the circumstances under which they take it being considered, there would be material detriment to the remainder; but they say they do not propose to take the land in such a way as to shut off the access to the remainder, but to take it subject to an undertaking to give under the railway a permanent right of way, the equivalent of the original access. Taking that

to be true, could any man honestly say that there is any real detriment to the remainder of the property? It seems to me that no man without bias could say so. It is suggested that the way in which the railway company propose to take the land and deal with the access cannot be taken into account. It seems to me it would be doing away with all the benefits of s. 42 if we acquiesced in that view.

Then it is suggested that the railway company cannot give this right of way. If to give this right of way were inconsistent with the purposes for which they were taking this land, then they could not give the claimant that right. If they could not give him that right, then I think the arbitrator could not properly take into account their proposition or the undertaking to do it; but looking at the cases that have been cited to us other than the case of *Mulliner* v. *Midland Ry. Co.* (1), they are direct authorities, as it seems to me, particularly the *Grand Junction Canal Co.* v. *Petty* (2), that the company can give this right of way, because it is not inconsistent with any purpose for which they have bought the land. Therefore, they can give this right. They undertook before the arbitrator to give this right, and they undertook to do it in order to govern his decision. If, after that, they refused to carry out their undertaking, it seems to me that the Court would immediately compel them to do so. Therefore, I think it is a positive obligation from which they could not escape, and that this is within s. 42.

But there is more in this case, as it seems to me, because here that which they propose to do is a thing which, if they did not undertake to do it, they could be made to do under the 68th section of the Railways Clauses Consolidation Act, 1845, after they had this land. I desire to say that my interpretation of s. 42 is larger than that, and that the construction which I have put upon it would be applicable even though the case were not also within s. 68; but its being within s. 68 makes the case stronger.

For these reasons, I think we ought to answer the question put to us to the effect that the arbitrator had a right to take

(1) 11 Ch. D. 611. (2) 21 Q. B. D. 273.

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into account the mode in which the railway was to cross the land and the absolute obligation which the railway company were prepared to take upon themselves to give this right of way; and he was therefore entitled to say that, taking that into account, he held that what was proposed to be done was not a material detriment to the land not taken. Under those circumstances, I think this appeal must be allowed.

A. L. SMITH L.J. If it were not for s. 42 of the special Act the case would be quite clear; for under s. 92 of the Lands Clauses Consolidation Act, 1845, no owner of a house or building is bound to sell to a railway company less than the whole of his house or building; in other words, if a railway company comes across a portion of a house, or it may be the curtilage of a house, the owner can compel the company to take the whole of the house, although the company does not want it. What, then, is the meaning of s. 42? It appears to be that, after the passing of that Act, with regard to the special properties, the landowner is no longer to have the power to compel the company to take the whole if they want only a portion of the property, unless he can shew to the tribunal which has to decide the matter that the severance would cause material detriment to the remainder of the property. If the arbitrator or the jury find that severing the portion would cause material detriment to that which is left, then the owner has a right, as he had before, to compel the railway company under s. 92 to take the whole. If, on the other hand, the arbitrator or jury come to the conclusion that the severance would not cause material detriment, then the landowner has no power to compel the company to take the whole.

How is it to be found out whether the severance will cause material detriment to the remainder or not? The owner says that there will be material detriment to the remainder. The company say that no material detriment will be caused. The arbitrator is then called upon. What is he to do? The first thing is to find out how the severance is to take place. He must consider the circumstances. Are the company going to carry the line in a tunnel, or in an open cutting, or on an

embankment, or how? Are they going to cut an existing road in two, or are they going to build an archway and carry the road over an arch? All such things must be taken into consideration, because until the arbitrator has considered these matters he cannot make up his mind whether material detriment will be suffered or not. Now, if he is entitled to look into these things to find out how the severance is to take place, is he not to take into account, if an archway is to be put up, the right of passage under the archway which will be given? It seems to me that to say that the mere fact of the severance taking place, and the corner being taken off, is ipso facto evidence of material detriment to the residue, is to wipe out the efficacy of s. 42, which was clearly passed, I should say, for the benefit of the railway company—to remove from them the obligation to take land they do not want, supposing the landowner is not damaged in the residue that is left.

Therefore, when I come to answer the question left to us by the arbitrator—whether he was entitled to take into consideration the matters already alluded to—I say, Yes. It seems to me the arbitrator has come to this conclusion: that if the company are entitled in law to do what they say they are going to do, that is, build a bridge over this road and grant a perpetual easement under it to the claimant, there would not be such a material detriment to the remainder of the property as to entitle the owner to call upon the company to take the whole.

One word about the case of *Mulliner* v. *Midland Ry. Co.* (1) I am not going to controvert that case. I do not know that that case applies, but if it is to be cited as a case which says that the railway company cannot give an easement through its own embankment from one side to the other, I cannot, with great respect, agree. Suppose a railway crosses a field and cuts it into two pieces, and the company buy the land by agreement, and agree that they will make a covered way through an arch in their embankment, surely it is obvious that can be done; and I cannot think the case of *Mulliner* v. *Midland Ry. Co.* (1) had any such effect as is now suggested.

(1) 11 Ch. D. 611.

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A. L. Smith L.J.

The cases cited to us the other way were *Grand Junction Canal Co.* v. *Petty* (1) and *Foster* v. *London, Chatham and Dover Ry. Co.* (2), both of which were founded on the proposition of law laid down by Parke B. (then Parke J.) in *Rex* v. *Leake* (3), in which he said: "If such use by the public" (it was the question of the grant of a right of way in that case) "be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." That does not mean that it would be incompatible with the objects of a company that they should make accommodation works to give access from one side of their line to the other. Moreover, as has been pointed out by the Master of the Rolls, there is also the 68th section of the Railways Clauses Consolidation Act, 1845; and I see no reason why the appeal in this case should not succeed.

RIGBY L.J. I agree that we ought to answer the question raised by the case in the affirmative. The matters as to which the umpire wishes to know whether he is entitled to take them into consideration are shortly these: the company contend that in the event of their taking the portion of the land for which they gave notice to treat they would be bound to make and maintain accommodation works under s. 68 of the Railways Clauses Consolidation Act, 1845, for the accommodation of the owner and occupier of the remainder of the land. Their contention was that an access by means of a roadway under one of the arches in their viaduct was such an accommodation work as is there mentioned. Now, in considering that, I do not at all rely upon the alternative which they suggest, that whether they would or would not be bound, they offered to undertake to make the access. I treat the other question as the substantial and important one—that under s. 68 of the Railways Clauses Consolidation Act, 1845, they were bound to give a sufficient and convenient access to the portion of the claimant's property for which they did not give notice to treat.

(1) 21 Q. B. D. 273. (2) [1895] 1 Q. B. 711.
(3) 5 B. & Ad. 469, at p. 478.

Now, under circumstances which are not fully explained and which do not require explanation, it appears that the company have actually entered into possession of the land which is comprised in their notice to treat; and it is clear that the other parties came to the conclusion that the railway company should in any event take that part of the property which was comprised in the notice to treat; and the question left was, whether they were not bound to take the rest. We have, then, the actual archway giving access, and I should say it was undoubtedly such an access as under s. 68 of the Railway Clauses Consolidation Act, 1845, the company would have been bound to give. I cannot doubt that if the question had been brought before justices they would have held the access provided by the company to be an accommodation work sufficient for the accommodation of the claimant. If that is so, it was an accommodation work such as the company would be bound to give, and, I think also, as the claimant would be bound under s. 68 to acquiesce in and to take as sufficient access. That being so, I think it was the duty of the umpire to consider those facts in forming the opinion at which he arrived—which was that, supposing that access to be a legal access and secured to the claimant in perpetuity, there was no material detriment to the remaining property by reason of the taking of the property actually included in the notice to treat.

With reference to the cases cited, I do not wish to say anything more about the cases which were apparently in favour of the appellants. I think they speak for themselves. I do not know that they have been in any way questioned, and I say nothing more about them. But as to the case of *Mulliner* v. *Midland Ry. Co.* (1), which was cited against them, that seems to have no reference to a case of this kind. There the land was purchased by a railway company, and was vested in them for the purposes of the railway, and for no other purpose. I conceive that the decision of the Master of the Rolls in that case was in accordance with the law, and I do not know that it has ever been seriously disputed. No doubt it has been tried, as in the present case it has been tried, to extend that decision

(1) 11 Ch. D. 611.

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beyond what the Master of the Rolls meant; but such attempts have failed. His decision was that a piece of land taken for the purposes of the railway company, and required for the purposes of the railway company, cannot be alienated by them without special authority from Parliament, and that is undoubted law. The Master of the Rolls in that case went somewhat further, and said that they not only could not allow the land itself to be alienated, but that no perpetual right of way could lawfully be created by them; and I think that is a reasonable deduction from the other proposition that the land cannot be alienated. That, I believe, is all that case was intended to decide, and the case has no bearing on that before us.

I agree in the conclusion which has been arrived at, and this appeal must be allowed.

C. A. Russell, for the company, applied that the appeal should be allowed with costs.

S. M. Everard, for the claimant. The Court of Appeal in *In re Holliday and the Mayor of Wakefield* (1) decided that the costs of an appeal, on a special case stated by an arbitrator, were costs incident to the arbitration within s. 34 of the Lands Clauses Consolidation Act, 1845, and were to be borne as therein provided, and the Court has no jurisdiction over such costs.

C. A. Russell. That case was decided in the year 1888, when s. 5 of the Common Law Procedure Act, 1854, which gave an arbitrator power to state a case, but said nothing as to costs, was in force. That section has been repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), and s. 7 of this latter Act has been enacted in its stead. Sect. 20 is, "any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just." This is perfectly general, and gives this Court power to deal with the costs of this appeal.

LORD ESHER M.R. *In re Holliday and the Mayor of Wakefield* (1) came before this Court before the Arbitration Act,

(1) 20 Q. B. D. 699.

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1889, was in force. That case is no longer applicable, for the Arbitration Act, 1889, has repealed s. 5 of the Common Law Procedure Act, 1854, under which it was decided, and has given the Courts a discretion as to costs. This Court has now power to deal with the costs of this appeal, which must be allowed with costs.

A. L. SMITH and RIGBY L.JJ. concurred.

Appeal allowed with costs.

Solicitors for claimant: *Bower, Cotton & Bower, for Sir Thomas Wright & Co., Leicester.*

Solicitors for company: *Cunliffes & Davenport, for John Storey, Leicester.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1896 *July* 20.

THE QUEEN *v.* THE TYNEMOUTH RURAL DISTRICT COUNCIL.

Local Government—New Street—Street Sewers—Main Outfall Sewer—Expense of Constructing—Building Plans—Refusal of Local Authority to Approve —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 150, 157, 277.

An owner of land in a rural sanitary district, who proposed to lay it out as a building estate and to erect on it blocks of houses arranged in streets, deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the middle of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, and also the necessary main outfall sewer:—

Held, affirming the judgment of the Queen's Bench Division, that the local authority were not entitled to attach such a condition to their approval.

APPEAL from the judgment of the Queen's Bench Division reported ante, p. 219, where the facts are set out.

The application was for a mandamus to the Tynemouth Rural District Council to approve plans of new buildings proposed to be erected in the district. The Divisional Court

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(Lord Russell of Killowen C.J. and Wills J.) made the rule for a mandamus absolute. (1)

The defendants, the district council, appealed.

Lawson Walton, Q.C., and *Herbert Chitty*, in support of the appeal.

Robson, Q.C., and *Alexander Glen*, contra, were not called on.

LORD ESHER M.R. We think that this argument requires no answer and that the judgment of the Chief Justice must be affirmed.

The whole thing at present is in plan and not in work. The whole of this matter is with regard to something that is to be done. Whatever the plan is it has to go before the district council for their approval; and at the present moment they are not asked to do anything but approve the plan.

The district council have power to make by-laws as to what the plans shall contain; and under them the plans are to shew what buildings are proposed to be erected, the style of building, the line of the building, and the system of drainage of each of the houses proposed to be erected. These plans have shewn the elevation of the proposed buildings; they have shewn the lines of the buildings, that is the line of the street; and they have shewn how the proposers intend to drain those houses by house drains from each house into a sewer which is to run down the whole length of the street. If they have proposed that, what by-law have they contravened? The by-law says that they are to shew on the plans what in respect of those things they propose to do. That is exactly what they have shewn; and the Chief Justice is correct in saying that these plans as proposed do not contravene any one of the by-laws. But the district council say they will not approve these plans because the plans do not go further and shew what is to be the outfall of that sewer after it has gone through that street and has come to the end of it. What is more, it is obvious that if the plans had shewn the outfall the district council would not have approved of them unless Lord Hastings had said that he was ready to pay the cost of making the outfall sewer. That is their real

(1) Ante, p. 219.

proposal. The Chief Justice has said that there is nothing at this stage of the proceedings which entitles them to deal with the matter in that way. They say they are asked to make a sewer and to make an outfall at this present time when it may be that not one of those houses will ever be occupied. They are not asked to do anything of the kind. They need not move; they need not do anything until the buildings are erected. When the houses are going to be occupied or are being occupied, then the district council will be called upon perhaps to make a sewer down the centre of the street. I do not know about that, but they certainly would not be called upon until then to make the outfall. It is contended that when these houses are occupied or are on the point of being occupied there are legal means to enforce upon them their duty to carry the sewage to an outfall. If it is their duty to do it, and they can be forced to do it, when that arises they can collect the rates from those houses. All they have to do now is to determine whether there is a proper building plan. They do not attempt to say it is not in reality a proper plan, but they say they will not approve of this plan until another plan is before them not relating to the buildings. The Chief Justice has said that they have no by-law which justifies them in taking that position, and therefore he says they must approve these plans, and a mandamus is ordered. I think it was rightly ordered, and that this appeal fails.

A. L. SMITH L.J. I am entirely of the same opinion. In this case Lord Hastings proposes to erect some buildings and to lay out property of his own for a building estate, and he sent to the Tynemouth Rural District Council, as he is bound to do, plans of what he is going to erect. On the plans there is a notification of the intended mode of drainage in these words: "Drainage of buildings by-laws 61 to 66—4-inch pipes with ventilation shafts and inspection chamber built in bricks and cement and trapped." That is the description of the drainage which Lord Hastings is going to attach to each of these houses. There is a ground-plan shewing how the drain of each house is to be located, and the drain-pipe going out into the centre of

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the street, which clearly shews that the house drain is to communicate with the sewer which hereafter is to be put down in the street. The district council have no objection to the proposal made quâ buildings or quâ drainage; but they say that, if these houses are built and the drains carried into the middle of the street, there will have to be a sewer down the middle of the street to carry the sewage to the edge of the building estate, and also a sewer to take the drainage which will come down to the boundary of the estate to some outfall elsewhere. They desire to make Lord Hastings pay for that outfall drain, and the machinery which they bring to bear to accomplish this is their disapproval of the plans. In this position Lord Hastings comes to the Queen's Bench Division, and says that the district council have no right to try to coerce him into building an outfall sewer, though he is willing to pay for the sewer down the street to the edge of the building estate.

It has been decided on many occasions that a local authority cannot disapprove plans unless the plans are in contravention of a lawful by-law or some statute. The real question, then, is whether or not these plans are in contravention of any by-law. I cannot see that they are. The suggestion is that there ought to be a description in writing of the intended mode of drainage; but it seems to me impossible to say that the description is insufficient, and I think that suggestion fails as a matter of fact. But then it is said that the plans do not shew how the drainage which is sent down the sewer which is to be made in the street to the edge of this building estate is to be taken away from the end of that sewer. There is no by-law ordering that; and, what is more, if there were, I think it would be ultra vires. By s. 15 of the Public Health Act, 1875, "Every local authority shall cause to be made such sewers as may be necessary for effectually draining the district for the purposes of this Act." So that, when these house drains have run the house drainage into the sewer in this street, and the sewer is run down to the edge of Lord Hastings' estate, then the obligation is cast upon the Tynemouth District Council, within their district, of taking the whole of the sewage and carrying it away to a proper outfall. They cannot put that obligation on Lord Hastings.

I am of opinion that the judgment of the Chief Justice is quite right, and that the appeal should be dismissed.

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Appeal dismissed.

Solicitors for prosecutor: *Flux & Leadbitter, for Leadbitter & Harvey, Newcastle-upon-Tyne.*

Solicitors for district council: *Williamson, Hill & Co., for A. Whitehorn, North Shields.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1896 *July* 30.

BALLANTYNE *v.* MACKINNON.

Estoppel—Ship—Marine Insurance—Judgment for Salvage in Admiralty Court—Action against Underwriter—Defence that Loss did not arise from Perils insured against.

The captain of a steamer that had, during a voyage, run short of coal engaged a steam trawler to tow her to her port of discharge. The owner of the trawler brought an action in the Admiralty Court and recovered a sum of money for salvage. In an action by the owner of the steamer to recover, from an underwriter who had insured the ship against perils of the sea, the amount paid under the judgment:—

Held, that the defendant was not concluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against.

APPEAL from a judgment of Lord Russell of Killowen C.J. at the trial of the action without a jury.

The plaintiff was owner of the ship *Progress*, and the defendant an underwriter of a time policy against perils of the sea. The vessel, a steamship, sailed with a cargo from Hamburg to Sunderland. She had an insufficient supply of coal, and when about forty-one miles from Sunderland was proceeding under reduced steam and sail, but, as found by the Lord Chief Justice and by the Court of Appeal, was not in any danger by perils of the sea. The captain hailed a steam trawler and was towed to Sunderland. The owners of the steam trawler brought an action in the Admiralty Court for salvage services and recovered a sum of 350*l.*, which the shipowner sought to

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recover from the defendant. The learned judge gave judgment for the defendant.

The plaintiff appealed.

1896. July 9. *Bigham, Q.C.*, and *H. Boyd*, for the plaintiff. The salvage awarded by the Court of Admiralty is recoverable from the underwriters notwithstanding the fact that the necessity for the salvage services would not have arisen but for the deficiency of the ship's supply of coal. In cases where there is no warranty of seaworthiness the existence of an original defect in the condition of the ship without which the loss would not have occurred does not affect the right of the assured to recover on the policy, if the proximate cause of the loss was a peril of the sea. See *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (1), which is not overruled on this point by *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3); *Dudgeon* v. *Pembroke*. (4) Peril of the sea was the proximate cause of the necessity for the salvage services in this case. It is not necessary, in order that there may be peril of the sea, that rough weather should have come on, or that the ship should be in imminent danger. The captain was not bound to wait till actual danger arose. It was his duty to take reasonable precautions in the interests of the underwriters. The ship, being a steamer, could not be so effectively navigated without coals, and would have been in danger of being driven ashore on a rocky coast if bad weather had come on; and therefore the services rendered were necessary to avoid peril of the sea.

[They also cited on this point *Fawcus* v. *Sarsfield* (5); *Thompson* v. *Hopper* (6); *Davidson* v. *Burnand* (7); *Gibson* v. *Small*. (8)]

Secondly, the underwriters are concluded by the judgment of the Admiralty Court from saying that the services rendered were not salvage services. There is no case in which underwriters have ever disputed the correctness of a judgment of the

(1) 6 Q. B. D. 51.
(2) 12 App. Cas. 484.
(3) 12 App. Cas. 518.
(4) 2 App. Cas. 284.
(5) 6 E. & B. 192.
(6) 6 E. & B. 172.
(7) L. R. 4 C. P. 117.
(8) 4 H. L. C. 353.

Court of Admiralty awarding salvage. Such a judgment is in rem and gives a lien on the ship. Judgments by a Court of Admiralty, whether English or foreign, condemning ships as prize, are conclusive against all the world as to all the facts on which the judgment is based. See Stephen's Digest of the Law of Evidence, art. 42; *Lothian* v. *Henderson* (1); *Geyer* v. *Aguilar* (2); *Kindersley* v. *Chase* (3); notes to *Duchess of Kingston's Case*. (4) It is essential to an award of salvage that the ship should have been in peril of the sea. The judgment of the Court of Admiralty was clearly for salvage in the proper sense of the term, not for compensation under s. 434, sub-s. 2, of the Merchant Shipping Act, 1894.

Joseph Walton, Q.C., and *J. Hurst* (*H. C. S. Dumas* with them), for the defendant. Although there be no warranty of seaworthiness, there must be a loss by peril of the sea or other peril insured against in order that the plaintiff may recover on the policy. If the loss is not by a peril insured against, but by reason of a defect in the condition of the ship herself rendering her unfit to encounter the ordinary action of the winds and waves, the underwriters are not responsible. See *Anderson* v. *Morice* (5); *Merchants' Trading Co.* v. *Universal Marine Insurance Co.* (6); *The Xantho* (7); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (8) Here the Lord Chief Justice has found that there was no peril of the sea. The captain stated that the ship was not in distress and could have sailed to port. All that happened was that the captain supplied himself with motive power in substitution for the ship's own engines, which would not work for want of coal. It is the same as if he had taken a tug all the way from Hamburg. With regard to the second point: the effect of the judgment of the Admiralty Court is no doubt to establish a lien on the ship, and for that purpose it is no doubt conclusive as to the facts upon which it was based as against all the world like any other judgment in rem, but it is not conclusive as to those facts for collateral purposes. The only respect in which a

(1) 3 B. & P. 499.
(2) 7 T. R. 681.
(3) Referred to in Park on Insurance, 743.
(4) 2 Sm. L. C. (ed. 1896) 713, at p. 779.
(5) L. R. 10 C. P. 58, 609.
(6) 2 Asp. Mar. Cas. (N.S.) 431.
(7) 11 P. D. 170; 12 App. Cas. 503.
(8) 12 App. Cas. 518.

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judgment in rem differs from any other judgment is that it affects the status of the res, and for that purpose it is conclusive against all the world as to the necessary facts, but not for any other purpose.

The effect of s. 434, sub-s. 2, of the Merchant Shipping Act, 1894, is merely that the exhibition of signals of distress estops the shipowner from saying as against those claiming for salvage services that there was not peril of the sea; but this would not affect the underwriters.

H. F. Boyd, in reply. It is admitted that the decision of Lush J. in the case of *The Golden Fleece* (*Merchants' Trading Co.* v. *Universal Marine Insurance Co.*), cited in *Dudgeon* v. *Pembroke* (1), is against the plaintiff's contention; but it is contended that that decision cannot be supported. If the Chief Justice had found that there was no peril of the sea, he would not have gone into the law of the case and dealt with *Fawcus* v. *Sarsfield* (2), and other cases on the same point. He must have thought that there was a peril of the sea to the ship in her then condition, or at all events a reasonable apprehension of danger.

Cur. adv. vult.

July 30. The judgment of the Court (Lord Esher M.R., Kay and A. L. Smith L.JJ.) was read by

A. L. SMITH L.J. This is an action by a shipowner against an underwriter, upon a time policy which covered his steamship *Progress* against losses occasioned by perils of the sea, and the plaintiff's case is that whilst so covered, by reason of such perils, salvage services were rendered to his ship, for which he had been compelled to pay the sum of 350*l.*, and the plaintiff now seeks to recover this amount from his underwriter as being a loss caused by the direct and immediate consequences of perils of the sea.

If he makes out this case, this loss is recoverable under an averment that there has been a loss by a peril of the sea, and this was so held in the House of Lords in *Aitchison* v. *Lohre* (3),

(1) L. R. 9 Q. B. 581, at p. 596. (2) 6 E. & B. 192.
(3) 4 App. Cas. 755.

and it is not recoverable under the suing and labouring clause in the policy.

The defence set up is, that the loss sued for did not arise from a peril of the sea, but solely from the vice of the subject-matter insured, in particular that the loss arose solely in consequence of the plaintiff's ship when she sailed having an insufficiency of coal on board for the contemplated voyage, and without the intervention of any sea peril; and this is what, as we understand, the Lord Chief Justice has found to have been established by the evidence before him.

We agree with the argument on the part of the plaintiff, that if the judgment of the Lord Chief Justice is to be read as holding that the services rendered to the plaintiff's ship, for which he has had to pay the 350*l.*, were proximately caused by a sea peril, though remotely and substantially brought about by the condition of the ship, or in other words, that if there was a sea peril to the ship by reason of its then condition, i.e., the shortness of coal, the Lord Chief Justice would have been wrong in holding as he did that the underwriters were not liable; and the case of *Dudgeon* v. *Pembroke* (1) in the House of Lords is conclusive as to this; but in our opinion this is not the judgment of the Lord Chief Justice.

The Lord Chief Justice says: "It was admitted by the plaintiff that there was no weather which rendered salvage assistance necessary, and that the need of the assistance of the trawler and the tug was occasioned by the want of coal. Indeed, the master in his official deposition states that there was no damage to the ship, which he says could have proceeded under sail, and he adds that the ship was not in distress. Can it be said on the facts here stated that the salvage services were at all rendered necessary, or the salvage expenses incurred by reason of any peril insured against? In my judgment it cannot . . . . that condition arose directly from the absence of fuel, and no damage or peril of the sea supervened. In other words, it was the unseaworthiness of the ship which caused the need—if need there were—of salvage aid, and no peril of the sea caused or contributed to the necessity for the

(1) 2 App. Cas. 284.

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aid." [The Lord Justice then examined the evidence, and continued :—]

Upon this evidence how can this Court find, as we were invited to do by the plaintiff, that the Lord Chief Justice came to a wrong conclusion upon the question of fact as to the non-existence of a sea peril when the towage services were rendered to the *Progress*? There was no weather, no sea on, no accident or casualty of any kind to the ship, no incursion of salt water into the ship, which could have completed the voyage under sail, and no reasonable apprehension of danger.

Cases were cited on the one side and the other to shew what did or did not constitute a sea peril. For instance, the *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (1), where the explosion of a boiler was held to be covered by the policy; the *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2), where the last case was disapproved of, and damage to a donkey-engine was held not to be covered by a policy covering perils of the sea; the case of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3), where sea water was let into a ship, and damage resulted therefrom, by reason of rats gnawing a hole in a pipe, in which it was held that this damage was a danger and accident of the sea; and the ruling of Lush J. in the case of the *Golden Fleece*, which will be found cited by Blackburn J. in his judgment in *Dudgeon* v. *Pembroke* (4), where Lush J. pointed out to the jury, when considering what was or was not a peril of the sea, that the question was whether the loss arose from injury from without or from weakness from within, and that what underwriters insured against were casualties that might happen, and not consequences which must happen.

These cases, and others which might be cited, are obviously not decisions which can be applied to the present case, for they arose under totally different circumstances and different facts; but they are of value in shewing the reasoning by which in given states of fact it has been held that a loss was or was not occasioned by a peril of the sea.

(1) 6 Q. B. D. 51.
(2) 12 App. Cas. 484.
(3) 12 App. Cas. 518.
(4) L. R. 9 Q. B. 581, at p. 596.

As before stated, we agree with the Lord Chief Justice when he held upon the evidence before him that the loss sustained was not occasioned by a peril of the sea, for in our judgment the loss complained of arose solely by reason of the inherent vice of the subject-matter insured: we mean the insufficiency of coal with which the ship started upon her voyage, the consequence of which was that what in fact did happen must have happened, namely, that the ship ran short of coal, no sea peril bringing this about in any shape or way, or placing the ship in a position of danger thereby.

But a further point is now taken before us, which was not taken before the Lord Chief Justice, and it is that the Admiralty Court has held that the owner of the steamship *Progress*, her cargo and freight, were liable to the owner of the steam trawler for salvage services amounting to the sum of 350*l.* rendered by the trawler in towing the steamship into Sunderland; and it is said that this judgment concludes the matter as to the existence of a supervening of perils of the sea.

What happened in the Admiralty Court was this: the owners of the steam trawler instituted a salvage suit against the owners of the steamship *Progress*, her cargo and freight, for salvage services rendered to her.

The owners of the *Progress* in that suit admitted that salvage services had been rendered to her by the steam trawler, and paid 300*l.* into court, and asserted that this amount was sufficient recompense to the plaintiffs. Upon these pleadings the Admiralty Court proceeded to try the case, and there was awarded to the owners of the steam trawler for their admitted services 50*l.* in excess of the 300*l.* paid into court, making 350*l.* in all. Upon what ground the owners of the steamship admitted that 300*l.* was due does not appear; whether it was based upon the fact of an agreement, or upon the fact of the trawler having been hailed as she was by the steamship, or upon a salvage service proper having been rendered, it is immaterial for the reasons given below to inquire. That this suit was a proceeding against the steamship *Progress*, and that the judgment was a judgment in rem which constituted an effective maritime lien upon the steamship, we do not doubt;

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but the defendant was no party to this suit, and the question is, as to what, as against the defendant, is this judgment conclusive? Unless it concludes the question in the affirmative that a sea peril did supervene, the defendant, as before stated, in our opinion is entitled to judgment.

That a judgment in rem by a Court of competent jurisdiction is conclusive against all the world as to the status of the res, that is, of the thing adjudicated upon, is clear, and consequently as regards the question as to whether a lien attaches to the steamship *Progress* for 350*l.* there can be no doubt, for this has been conclusively determined by this judgment of the Court of Admiralty, and against all the world.

The question is whether this judgment also concludes as to the grounds upon which the judgment must have proceeded. There is a passage in Blackburn J.'s judgment in *Castrique* v. *Imrie* (1), when delivering his own opinion and that of Bramwell B., Mellor and Brett JJ., and Cleasby B. in the House of Lords, which is pertinent to this point. The learned judge says: "A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." As to a judgment being only conclusive as to the point decided, there is as to this in our opinion no distinction between a judgment in rem and a judgment in personam, excepting that in the one "the point" adjudicated upon (which in a judgment in rem is always as to the status of the res) is conclusive against all the world as to that status, whereas in the other "the point," whatever it may be, which is adjudicated upon, it not being as to the status of the res, is only conclusive between parties or privies.

Now, what was "the point" decided by the judgment in rem in the Admiralty Court in the present case? It was that a valid maritime lien to the amount of 350*l.* attached to the

(1) L. R. 4 H. L. 414, at p. 434.

steamship *Progress*, and that to this extent its status was conclusively determined.

It was argued that there might be a claim for salvage without the intervention of a sea peril, and the judgment of Dr. Lushington in *The Batavier* (1) was cited. It is not necessary to decide whether this can be so; but we say if it can, then such a salvage claim is not recoverable upon a policy against sea perils for the obvious reason that the risk covered will not have occurred.

Authorities were referred to in which judgments of Prize Courts condemning vessels as being the property of an enemy were held to be not only conclusive evidence that the vessels were condemned, but also conclusive evidence of the fact that the vessel was not a neutral. It was contended on the part of the defendant that these were exceptional cases. We agree that they are, and that they have no application to judgments in rem in general. This will be found from looking through the cases cited in the *Duchess of Kingston's Case* (2); and we also refer to what Blackburn J., for himself and the other learned judges in *Castrique* v. *Imrie* (3), stated as to this. For these reasons we think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Botterell & Roche.*
Solicitors for defendant: *Pritchard & Sons.*

(1) 1 Spinks, E. & A. 169. (2) 2 Sm. L. C. (ed. 1896) 713, at p. 779.
(3) L. R. 4 H. L. 414, at p. 434.

A. M.

C. A.
1896
Aug. 3.

[IN THE COURT OF APPEAL.]

BENNETTS & CO. *v.* McILWRAITH & CO.

Practice—Joinder of Defendants—Alternative Relief—Claim against Charterer for not Loading Cargo—Claim against Agent for Breach of Warranty of Authority—Order XVI., *rr.* 5, 7, 11.

In an action against the defendants for breach of warranty of authority, it appeared that they had assumed to act as agents in entering into a charterparty for loading the plaintiffs' vessel with a cargo which was not supplied. The plaintiffs, being in doubt as to whether the defendants had or had not authority, applied to add the alleged principals as defendants:—

Held, that the plaintiffs were entitled to do so on the authority of *Honduras Ry. Co.* v. *Tucker* (2 Ex. D. 301), and *Massey* v. *Heynes* (21 Q. B. D. 330), which are not affected by the decision of the House of Lords in *Smurthwaite* v. *Hannay* ([1894] A. C. 494).

APPEAL from an order of a judge at chambers directing that Burns, Philp & Co. should be added as defendants.

The plaintiffs were owners of a ship which was chartered for a homeward voyage from Sydney, but was not loaded in pursuance of the charterparty. This action was commenced against McIlwraith & Co. for misrepresentation of authority to enter into the charterparty as agents for Burns, Philp & Co.

The plaintiffs also sued McIlwraith & Co. as principals for breach of the charter, and also for breach of duty as agents.

Upon discovery of documents the plaintiffs considered it probable that they could shew that Burns, Philp & Co. had authorized McIlwraith & Co. to enter into the charterparty and they thereupon applied at chambers for leave to add Burns, Philp & Co. as defendants, and obtained an order, against which Burns, Philp & Co. appealed.

July 27. *Bigham, Q.C.*, and *D. C. Leck*, for the added defendants. The plaintiffs' cause of action against the original defendants will not be "defeated" within the meaning of Order XVI., r. 11, by reason of the non-joinder of Burns, Philp & Co. The cause of action alleged against Burns, Philp & Co.

is upon the charterparty, and is independent of that alleged against McIlwraith & Co. Order XVI., r. 1, relates to the joinder of plaintiffs, and rule 4 to the joinder of defendants; but they both deal with what may be done at the time of issuing the writ. Rule 11 contemplates the possibility of it being necessary subsequently to add a party for the due disposal of the cause of action stated in the writ or in the pleadings. That rule does not give power to add a new cause of action. Burns, Philp & Co. are not "necessary" parties to the cause of action to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause.

It is clear from *Smurthwaite* v. *Hannay* (1) that Order XVI. deals only with the parties to an action, and not with different causes of action. *Sadler* v. *Great Western Ry. Co.* (2) shews that separate causes of action cannot be joined as against separate defendants. The order, therefore, adding Burns, Philp & Co. as defendants was wrong.

H. F. Boyd, for the plaintiffs. Order XVI. applies to a plaintiff who is suing an agent for breach of warranty of authority, so as to enable him to join the alleged principal for the purpose of preventing the action failing altogether. If the defendants prove at the trial that they had authority from Burns, Philp & Co. to effect the charterparty, then, unless Burns, Philp & Co. are joined as defendants in this action, the plaintiffs will have to sue Burns, Philp & Co. in Sydney on the charterparty, and in that action the plaintiffs may fail to prove that Burns, Philp & Co. authorized the present defendants to effect the charterparty. To remedy any such miscarriage as that, Order XVI. was framed. In *Massey* v. *Heynes* (3) the Court of Appeal allowed, in an exactly similar action to this, notice of the writ to be served on the alleged principals abroad. That case, which was not cited in *Smurthwaite* v. *Hannay* (1), is binding upon this Court. *Smurthwaite* v. *Hannay* (1) was decided upon rule 1 of Order XVI., which deals with the joinder of several plaintiffs, and it does not affect alternative causes of action by one plaintiff against different defendants.

(1) [1894] A. C. 494. (2) [1895] 2 Q. B. 688; affirmed [1896] A. C. 450.
(3) 21 Q. B. D. 330.

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D. C. Leck, in reply, referred to *Edward* v. *Lowther*. (1)

Cur. adv. vult.

1896. Aug. 3. A. L. SMITH L.J. read the following judgment. The plaintiffs are shipowners, and they have, as they allege, obtained a charter for their ship for a homeward voyage from Sydney to London. They say that their ship, pursuant to such charter, proceeded to Sydney to load the chartered cargo, which was not supplied, whereby they suffered damage for which they bring this action. The plaintiffs were in doubt from whom they were entitled to obtain redress for the non-loading of this cargo, whether from Burns, Philp & Co., the ostensible charterers, or from McIlwraith & Co., the brokers who effected the charter, inasmuch as Burns, Philp & Co. asserted that McIlwraith & Co. had no authority from them to fix them with the charter. In these circumstances the plaintiffs issued a writ against McIlwraith & Co. for representing that they had authority to enter into the charter for Burns, Philp & Co., whereas in fact they had not such authority. The plaintiffs in their statement of claim set out two other alternative causes of action against McIlwraith & Co.; but upon the affidavits it is clear that the above is the only cause of action upon which they really rely against McIlwraith & Co. It turns out upon discovery of documents that it is probable that Burns, Philp & Co. did give authority to McIlwraith & Co. to bind them with the charter; and in these circumstances the plaintiffs seek to add Burns, Philp & Co. as defendants, and Collins J. made the order under Order XVI., r. 11.

That rule deals, among other things, with the addition of the names of parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter; and rule 7 of the same order is as follows: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by a special

(1) 45 L. J. (Q.B.) 417.

order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties."

It is said that the learned judge had no jurisdiction to make the order. If he had jurisdiction, I cannot doubt that he rightly exercised it in making the order.

The redress, it will be seen, is sought against two persons, but the right to it arises out of one common transaction. This very point has been expressly decided in the year 1877 in this Court by Cockburn C.J., Mellish L.J., Baggallay J.A., and Bramwell J.A., in the case of *Honduras Ry. Co.* v. *Tucker* (1), under the former Order XVI., r. 6, which is the equivalent of the present Order XVI., r. 7. There can be no doubt as to this. Again, in the year 1888, in *Massey* v. *Heynes* (2), this Court held that where, as in the present case, an action was brought against agents in this country for breach of warranty of authority, the foreign principals were proper parties to be joined as co-defendants. It is clear that these two cases are conclusive authorities, if they have not been overruled, to shew that my brother Collins had, in the circumstances of this case, jurisdiction to make the order; but it is said that these cases are no longer law, and that the House of Lords in *Smurthwaite* v. *Hannay* (3) has overruled them.

It is said, and with truth, that the House of Lords decided that Order XVI., rr. 1 and 4, do not apply to joinder of separate causes of action, but only to joinder of parties; and if the question in the two cases in this Court had arisen under rules 1 and 4 of Order XVI., I must and should have held that the two cases had been overruled, and that the order could not be made. It will be seen, however, that the House of Lords did not deal with or even allude to rule 7 of Order XVI., which is a very different rule to rules 1 and 4 of the order, nor was a case similar to the present then before the House of Lords; and, consequently, neither rule 7 nor the two cases above mentioned were referred to.

In these circumstances, I have come to the conclusion that

(1) 2 Ex. D. 301. (2) 21 Q. B. D. 330.
(3) [1894] A. C. 494.

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A. L. Smith L.J.

the two above-mentioned cases have not been overruled. I am bound by them, and I may add that I think them rightly decided.

I think this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The question is whether the learned judge had jurisdiction to make the order appealed from. I certainly should not be disposed to interfere with his exercise of discretion as to making the order if he had jurisdiction to do so.

It is said that the matter is determined by the judgment of the House of Lords in *Smurthwaite* v. *Hannay*. (1) We are bound to give the fullest effect to that case, and, in applying it to the case before us, to consider carefully how far it went. That decision put an interpretation primarily on rule 1 of Order XVI., and incidentally on rule 4 of the same order. Their Lordships refrained from giving any decision on the case of *Booth* v. *Briscoe* (2), where several persons who were joined as plaintiffs sued in respect of a libel. They refused to decide whether this was right, nor did they touch upon the point now before us, or deal with the rules 5 and 7 of Order XVI. Rule 5 manifestly deals with joinder of causes of action, and there is nothing in the judgment which deals with that rule or with rule 7 which we have now to consider. We are not at liberty to extend the judgment of the House of Lords beyond the class of cases which were being dealt with, nor to conjecture what would have been the result if cases falling under rules 5 and 7 had been involved in the appeal. Under these circumstances, the cases of *Honduras Ry. Co.* v. *Tucker* (3) and *Massey* v. *Heynes* (4) are outside the decision in *Smurthwaite* v. *Hannay* (1), and are binding on us. In the former case, Cockburn C.J. commenced his judgment by saying that it was not necessary to decide whether the case fell within Order XVI., r. 3, corresponding to the existing rule 5; but he decided that it came within rule 6, corresponding to the present rule 7. I understand that Mellish L.J. and Baggallay J.A. agreed with that

(1) [1894] A. C. 494.
(2) 2 Q. B. D. 496.
(3) 2 Ex. D. 301.
(4) 21 Q. B. D. 330.

view, while Bramwell J.A. decided on a different ground. The other case was decided on considerations different from those before the House of Lords in *Smurthwaite* v. *Hannay*. (1) Unless we are bound by authority to say that those cases are overruled, I am constrained to come to the same conclusion as was arrived at in those cases. I am therefore of opinion that the learned judge had jurisdiction to make the order, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Lowless & Co.*

A. M.

1896
Aug. 10, 11.

In re AN ARBITRATION BETWEEN MORGAN AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Lands Clauses Acts—Compensation—Land let for Public Park—Power to re-enter if compulsorily taken.

The claimants demised land to a corporation at a low rent on condition of its being laid out and maintained as a public park. The lease contained a proviso that in case any part of the land should be compulsorily taken under the powers of any Act of Parliament it should be lawful for the claimants to re-enter upon and repossess it. Part of the land having been compulsorily taken by a railway company under the powers of an Act of Parliament:—

Held, that the claimants were entitled to the commercial value of the land taken as freed from the lease, and not merely to the capitalised value of the rent paid therefor by the corporation.

AWARD stated by an arbitrator in the form of a special case.

In 1822 the corporation of Swansea demised to the claimants' predecessor in title thirty-eight acres of land for ninety-nine years at a yearly rent of 9*l*. 2*s*. The land was known as "burrows," that is sand by the sea-shore just above high water mark. Part of it was used for building purposes, and about 2000 houses, part of the town of Swansea, were built upon the burrows.

(1) [1894] A. C. 494.

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In 1877 the claimants relet to the corporation eleven acres sixteen perches of this land for the whole of their term, less one day, at a yearly rent of 5*l.* per acre.

This lease contained the following provisions, inter alia:—

"That the mayor aldermen and burgesses shall and will lay out the said pieces or parcels of ground as a public park and recreation ground for the use of the people of Swansea and will keep the same so laid out in good and sufficient repair and order for all the term hereby granted"; and

"That in case the said pieces or parcels of ground and premises hereby demised or any or either of them or any part thereof shall be required or taken by a railway or other public company under the power or authority of an Act of Parliament, then and in such case it shall be lawful for the lessor his executors administrators or assigns into or upon so much of the said premises hereby demised as is so required to re-enter and such premises to have again and repossess of his and their former estate."

In 1891 the London and North Western Railway Company, acting under the powers conferred upon them by Act of Parliament, gave notice to treat for, and in March, 1892, they took possession of, one acre and thirty-two perches, part of the land relet by the claimants to the corporation. The claimants did not actually re-enter or repossess themselves of any part of this land, but they claimed compensation under the Lands Clauses Act, and the question was as to the principle upon which such compensation should be estimated.

On behalf of the company it was contended that as the claimants had parted with their term except for one day the value of their interest in the land taken was the amount of the rent which would be lost to them during the residue of the term, together with the value of one day's reversion. On this principle the arbitrator assessed the compensation to be paid to them at 182*l.* 10*s.*

On behalf of the claimants, however, it was contended that, as the railway company had taken part of their land under the powers of an Act of Parliament, they were entitled to the benefit of the proviso in their lease to the corporation, and

could treat the land so taken as in hand and free from the lease to the corporation, and, therefore, were entitled to receive as compensation the sum for which such land might be expected to let for commercial purposes during the remainder of the term. On this principle the arbitrator estimated the amount to be paid at 735*l*.

Channell, Q.C., and *Glascodine*, for the claimants. The land in question was relet to the corporation for the purpose of an esplanade and public park at a nominal rent, because that would improve the rest of the claimants' property; but it was not intended that the railway company, if it compulsorily acquired the land, should pay a merely nominal price for it. The proviso was, therefore, inserted in the lease for the express purpose of preventing this.

[They were stopped.]

J. G. Pease (*Greene, Q.C.*, and *C. A. Russell* with him), for the respondents. The test in all these cases is not the benefit which the company receives, but the loss which the claimant sustains. For instance, where a churchyard or cemetery is taken, the value is not that of the land if it could be used for secular purposes, but its value as a churchyard or cemetery: *Stebbing* v. *Metropolitan Board of Works*. (1) Here, but for the act of the company in taking the land, the claimants would be bound by their lease to the corporation, and could receive nothing more than the rent reserved by it. The act of the company cannot increase the value of the land to the claimants: *Penny* v. *Penny*. (2)

But, in the second place, the proviso is nugatory because it only gives the claimants power to determine the lease. That is done ipso facto by the taking possession of the land by the company. The claimants have not actually re-entered on this land, nor could they do so after it was taken by the company.

Channell, Q.C., replied.

DAY J. This case presents much difficulty, because the leases and the arrangements upon which the leases were based,

(1) L. R. 6 Q. B. 37. (2) L. R. 5 Eq. 227.

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and the circumstances under which the subsequent claim was made, are unusual and difficult to reconcile with known and well established principles of law.

The material facts are, that in the year 1882 thirty-eight acres of land or thereabouts were by lease demised by the corporation of Swansea for ninety-nine years to the claimants' predecessor in title at a yearly rental of 9*l.* 2*s.*, the land being in the nature of what is termed here burrows—that is, sand by the sea-shore just above high water mark. Part of it has been used for building purposes, and upward of 2000 houses, part of the town of Swansea, are built upon the other part of the burrows. Whether the other part of the burrows is connected with this part of the burrows or not, I am not aware. Two thousand houses are said to be built on some portion of the burrows, and probably this caused a very considerable enhancement of the price in the neighbourhood. Afterwards, in 1877, certain portions of this land were demised to the corporation, by the successor in title who held under the lease of 1822, for the whole term, less one day, upon an improved rental of 5*l.* per acre. That 5*l.* per acre may or may not have been the rack-rent of the land at that time. No information was given to us expressly in the special case on this point. But in this underlease there are very peculiar stipulations introduced. First of all, there was a stipulation as to the laying out of the park. It provided that the land which was to be let to the corporation was to be laid out by the corporation as an esplanade and public promenade for the use of the people of Swansea, and that the corporation were to keep the same so laid out in good and sufficient repair and order for the term granted. The mayor and corporation were then to take these eleven acres of land and pay 5*l.* an acre per annum for them, and also to lay them out and keep them as a public promenade and park. The land was let to them, not for the purpose of making any profit to the corporation, but for the benefit of the people who were to have the use of the esplanade and park. The corporation would be benefited by having a large space of land unoccupied and not built upon, but in every other sense than that of a benefit to the public the land would be unprofitable in their hands. These eleven acres

of land which are demised by the underlease are a portion only of the land which the claimants' predecessor in title took from the corporation under the lease of 1822. Now, laying out this land as an esplanade and park no doubt would be beneficial to the other land of the claimants. By getting the corporation to take this land at 5*l.* an acre (which possibly at that time had become something considerably under the rack-rent) the claimants, if they could benefit their other land, were acting wisely and prudently, and it may very well be that that is the reason for entering into the stipulation which I am now going to refer to. That is: "In case the said demised premises or any part thereof"—that is, the eleven acres—"shall be required or taken by a railway or other public company under the power or authority of an Act of Parliament, then and in such case it shall be lawful to the lessors into and upon so much of the said premises hereby demised as is so required to re-enter and such premises to have again and repossess as of their former estate." The result of this was that if any portion of the eleven acres of land was required and taken by a railway company, then the claimants were to be at liberty to re-enter upon it. On this question of re-entry a good deal was said, and I am inclined to adopt the view put forward by Mr. Channell, that it does not mean formal re-entry, but that the interest of the corporation in the land was to cease, and the claimants were to be considered as entitled to the land and to have all that was to be got out of the land. Certainly it does not seem altogether unreasonable that if the claimants had given up their land to the corporation in consideration not only of 5*l.* a year, but of the corporation constructing on the land a park and improving the other property which the claimants held in the neighbourhood, they should have said, "I let you this land for a park. You will not be able to get any compensation from any railway company who takes the land, since it will be a public park, and not profitable to you; still it is only fair and reasonable that I, who have made a sacrifice of my own private interests in letting this land to you at 5*l.* an acre, may say, as against any company taking the land, that the land is mine to sell, and I can sell it for the fair and reasonable market price of the land."

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That is the contention substantially, as I understand it, of Mr. Channell, and I think myself that that contention is right.

This being the state of things, that which was thought possible or probable by the parties, when the claimants granted the underlease of 1877, occurred. The railway company did give notice to treat. No doubt the notice to treat at once puts an end to the right of the parties to interfere with the land or to add anything to its value. They must sell the land as of the value it was at the time the notice to treat was given, and the only question we have to determine is what was the value of the land at that time. When the notice to treat was given the effect of it was that the underlease ceased so far as the land which was comprised in the notice to treat was concerned. Nothing further could be done; but at the same time the right of the claimants, who were the only persons who could sell, remained. They were the only persons who could sell, and the only persons who had a title to sell, and they have been dealt with by the company, as I understand it, as the persons who had a right to sell. The land is not taken as land which was land belonging to the corporation. It is dealt with as land belonging to the claimants, and rightly so, and the company have given them notice to treat for the land, thereby establishing their title as the persons entitled to sell the land. What are they entitled to sell? Are they entitled to sell the land (to use the expression in the special case) "as in hand and free from the underlease"? That is the very object of the provision in the underlease. To my mind, the condition is fulfilled. The land has become in hand and free from the underlease, and the claimants are the only persons who can make a title to the land and can sell the land to the railway company.

Now we have to deal with the interest the claimants have in the land. The commercial value of the land taken by the company, if it is free from the underlease, is found by the arbitrator to be 735*l*. The land has increased in value to a very considerable amount. Who is entitled to that? The persons who alone can make a title to the land, and who have succeeded in getting it clear of the underlease. They are

entitled to sell the land as free land. The case is very clearly distinguishable from the case of *Stebbing* v. *Metropolitan Board of Works*. (1) In the case of a cemetery, the land has been permanently taken out of the market; but here the claimants have stipulated that the lease of the land for public purposes for 5*l*. an acre shall not prejudice their rights, and that if the land is required by a railway company they shall not be bound to take merely the capitalised value of the rental of 5*l*. a year, but shall be entitled to get the fair value of the land.

It seems to me, therefore, that the contention of the claimants is right, and that they are entitled to recover under the award the sum of 735*l*. I have not arrived at this conclusion without difficulty; but on the whole I think that the claimants are entitled to be paid for the land the full commercial value of it, and to get the 735*l*. which has been assessed by the arbitrator. My judgment is, therefore, in favour of the claimants.

LAWRANCE J. I am entirely of the same opinion.

Judgment for the claimants.

Solicitors for claimants: *Beor & Plant, Swansea.*
Solicitor for respondents: *C. H. Mason.*

(1) L. R. 6 Q. B. 37.

A. P. P. K.

C. A.
1896
Aug. 7.

[IN THE COURT OF APPEAL.]

In re CLARK.
Ex parte BEYER, PEACOCK & CO., LIMITED.

Bankruptcy—Bankruptcy Notice—Foreigner out of Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 6, *sub-s.* 1 (*d*).

A bankruptcy notice was issued under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*), against a foreigner who had not ordinarily resided or had a dwelling-house or place of business in England within the preceding year and was then abroad. The debtor subsequently coming to England temporarily, he was served with the bankruptcy notice in this country:—

Held, that the issue of the bankruptcy notice was valid.

Appeal by judgment creditors from the order of a registrar in bankruptcy setting aside a bankruptcy notice.

A judgment having been recovered by the appellants against the debtor for 4137*l.*, a bankruptcy notice was issued under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*), at the instance of the judgment creditors founded upon that judgment. The debtor, who was a foreigner resident at Boulogne, was abroad when the bankruptcy notice was issued; but, subsequently coming over to England for a day or two, he was served with the bankruptcy notice in this country. On application by the debtor the registrar set aside the notice on the ground that, as the debtor was not domiciled in England and had not within a year ordinarily resided or had a dwelling-house or place of business in England, he was not amenable to English bankruptcy law, and therefore that the notice ought never to have been issued. The judgment creditors appealed from the order of the registrar. (1)

(1) By the Bankruptcy Act, 1883, s. 4, sub-s. 1, "A debtor commits an act of bankruptcy in each of the following cases: . . . . (*g*) if a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and, in case the service is effected elsewhere, then

T. Willes Chitty and *Herbert Chitty*, for the judgment creditors. The objection taken by the debtor may be an answer to the petition when presented under s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883; but it is no objection to the validity of the bankruptcy notice. Upon coming within the jurisdiction the debtor became subject to the English bankruptcy law. The case comes exactly within the terms of s. 4, sub-s. 1 (*g*). The debtor in such a case may conceivably come over to reside or have a place of business in England before the petition comes on.

[They cited *In re Easton*. (1)]

Muir Mackenzie, for the debtor. This bankruptcy notice was bad, because, when it was issued, the debtor was a foreigner out of the jurisdiction, not subject to the bankruptcy law. The word "debtor" in s. 4, sub-s. 1, means a debtor amenable to the bankruptcy law of this country, and against whom the creditor is entitled to present a bankruptcy petition. A petition could not be presented in this case, because it does not come within s. 6, the debtor not being domiciled, or having within a year ordinarily resided or had a dwelling-house or place of business in England. Rule 137 of the Bankruptcy Rules, 1886–1890, provides that the request for the issue of a bankruptcy notice shall be in the Form 5 in the Appendix; and that form states that the debtor has for the greater part of the past six months resided or carried on business within the district of the court. The debtor being a foreigner resident abroad, and therefore not subject to the English bankruptcy law at the time when the bankruptcy notice was issued, could not commit an act of bankruptcy by not complying with it: *Ex*

within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

By s. 6, sub-s. 1, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . . (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

(1) 10 Morrell's Bank. Cas. 111.

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parte Blain, In re Sawers (1); *In re Pearson, Ex parte Pearson.* (2) In the latter case it would seem that the notice was set aside as well as the service of it on the ground that the debtor was a foreigner out of the jurisdiction. [He also cited *Ex parte Moore, In re Faithfull* (3); *In re Lynes, Ex parte Lester & Co.* (4).]

Herbert Chitty, in reply. In the case of *In re Pearson, Ex parte Pearson* (2), the point does not seem to have been taken that there was a distinction between the issue of the notice and the service of it, and the former might be valid as against a foreigner out of the jurisdiction though the service was invalid. Neither that case nor *Ex parte Blain, In re Sawers* (1), is an authority which governs the present case. In those cases the debtor was a foreigner out of the jurisdiction, and the question was whether leave to serve him with the bankruptcy notice out of the jurisdiction should have been given. Here he was served within the jurisdiction, and being within the jurisdiction he was amenable to the bankruptcy law of this country.

LINDLEY L.J. In this case I think the point taken for the judgment creditors a good one. The question arises with reference to the language of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

In this case a judgment was obtained against the debtor for 4137*l.*, and in that sense he was certainly a "debtor." A bankruptcy notice was issued founded on that judgment. The debtor subsequently came to England, and then became liable to be proceeded against under the bankruptcy law of this country. While in this country he was served with the bankruptcy notice. So far there appears to be nothing wrong having regard to the terms of s. 4. But the point relied upon for the debtor is that, as the debtor could not be adjudged bankrupt under s. 6 of the Act, he is not a debtor within the terms of s. 4, and therefore the bankruptcy notice ought never to have been issued. With regard to the authorities, I do not think that there is any case which touches this point exactly.

(1) 12 Ch. D. 522.
(2) [1892] 2 Q. B. 263.
(3) 14 Q. B. D. 627.
(4) [1893] 2 Q. B. 113.

The case of *In re Easton* (1) certainly does not, nor does the case of *In re Lynes, Ex parte Lester & Co.* (2) *Ex parte Blain, In re Sawers* (3), and *In re Pearson, Ex parte Pearson* (4), likewise do not touch this point, because in those cases the debtor never became subject to the bankruptcy law of this country. The point in this case really seems to me to be simply whether there is anything in relation to the issuing of the bankruptcy notice which makes it bad. I think that to hold it bad on the ground suggested, namely, that it was issued before the debtor came to this country, would be to put a very narrow construction on the Act. It does not seem to me to matter whether the debtor was subject to the bankruptcy law when it was issued. The substantial matter seems to be whether he was subject to the bankruptcy law when it was served upon him. It appears to me that this bankruptcy notice is valid, having regard to the terms of s. 4, whatever the notice may be worth to the judgment creditors at a later stage of the proceedings.

LOPES L.J. I think that for the purposes of the bankruptcy notice, s. 4 must be looked at independently of s. 6. It appears to me that this case is brought within the very words and meaning of s. 4. Clark, being clearly a debtor upon a judgment, came to this country. The word "debtor" in the Act has been held to mean debtor subject to the bankruptcy law of this country. In my judgment, as soon as Clark came to this country, being already a debtor, he became a debtor subject to the bankruptcy law of this country. That being so, he was served with a bankruptcy notice, which in every respect complies with the terms of s. 4. It is important, I think, to observe that the matter made essential by the section is that the notice should be served on the debtor in England. Beyond all question that condition was in this case complied with. But the point is taken that the notice was issued before he was in England. I cannot myself think that important. The case seems to me analogous to that of a writ of summons in an action, which is often issued against a defendant long before

(1) 10 Morrell's Bank. Cas. 111.
(2) [1893] 2 Q. B. 113.
(3) 12 Ch. D. 522.
(4) [1892] 2 Q. B. 263.

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it is served and while he is out of the jurisdiction, but can be served upon him when he comes within the jurisdiction. I think the view of the section contended for on behalf of the debtor is far too narrow.

RIGBY L.J. I am of the same opinion. The mere issue of the bankruptcy notice does not of itself affect the debtor in any way. It is not until it is served upon him that he is affected by it; and that is the reason why in s. 4, sub-s. 1 (*g*), the service in England is insisted upon and nothing is said about the issue of the notice. The important fact that brings a man within the provisions of the section is the service of the notice. As that was effected on the debtor in this country, he was at the time of service—that is, when he was first affected by the notice—subject to the bankruptcy law. It seems to me that the issue and service of the notice were both good.

Appeal allowed.

Solicitors for judgment creditors: *Pritchard, Englefield & Co., for J. Leigh, Manchester.*

Solicitors for debtor: *Harwood & Stephenson.*

E. L.

In re GOUDIE.
Ex parte THE OFFICIAL RECEIVER.

1896
July 27;
Aug. 10.

Bankruptcy—Practice—Equitable Execution—Appointment of Receiver—Judicature Act, 1873 (*c.* 66), *s.* 25, *sub-s.* 8—*Bankruptcy Rules*, 1886, *rr.* 93, 353—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 93.

The Court of Bankruptcy has jurisdiction under s. 25, sub-s. 8, of the Judicature Act, 1873, to appoint a receiver by way of equitable execution for the purpose of enforcing orders for the payment of money to the trustee in bankruptcy; but such an order will not, as a general rule, be made on an ex parte application.

THIS was a motion that raised the question whether the Court of Bankruptcy had jurisdiction to appoint a receiver by way of equitable execution.

On February 8, 1895, a receiving order was made against R. S. Goudie. He was subsequently adjudicated a bankrupt, and the official receiver became the trustee in bankruptcy.

On February 4, 1896, the trustee obtained an order from the Court of Bankruptcy for payment to him by one H. Stroud of a sum of 15*l.* and costs, which costs were subsequently taxed at 11*l.* 2*s.* 4*d.*

H. Stroud was examined in the bankruptcy, and it appeared that he had no property and no means of paying the 15*l.* and costs other than a sum of about 200*l.* per annum which he received from the trustees of the will of his father, A. W. Stroud, deceased.

The trustee now applied that he might be appointed receiver, without salary and without giving security, of the interest of H. Stroud under the will of the said A. W. Stroud, deceased, and of the annuity payable thereunder to H. Stroud, until satisfaction of the sum of 15*l.* and costs ordered to be paid by the order of February 4, 1896; and that H. Stroud might be ordered to pay the costs of the application.

Romer Macklin and *Schiller*, for the trustee.

[VAUGHAN WILLIAMS J. Has the debtor, H. Stroud, been served with the notice of motion?]

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In re GOUDIE. *Ex parte* OFFICIAL RECEIVER.

No. It was thought that the trustee was entitled to the order, and the practice in the Queen's Bench Division is to make these orders on an ex parte application: *Fuggle* v. *Bland*. (1)

[VAUGHAN WILLIAMS J. Have you considered *In re Shephard*? (2) You may take it that I shall not make such an order on an ex parte application. The matter must stand over, and the debtor, H. Stroud, must be served with the notice of motion.]

Aug. 10. The motion now came on again for hearing.

The debtor, H. Stroud, had been served, but did not appear.

Romer Macklin and *Schiller*, for the trustee. By rule 93 of the Bankruptcy Rules, 1886, every order of the Court may be enforced as if it were a judgment of the Court to the same effect; and by s. 93 of the Bankruptcy Act, 1883, the Court of Bankruptcy is a branch of the High Court. The order of February 4, 1896, is therefore equivalent to a judgment of the High Court, and under sub-s. 8 of s. 25 of the Judicature Act, 1873, and the Rules of the Supreme Court, 1883, Order XLII., r. 3, and Order L., r. 15a, this Court can appoint a receiver by way of equitable execution. If the application is not granted, the order of February 4, 1896, will become a nullity, because there is no other means of obtaining payment.

Poley, for the trustees of the will. This Court has no jurisdiction to make the order. No provision is made either by the Bankruptcy Act or Rules for the appointment of a receiver by way of equitable execution, and therefore under rule 353 of the Bankruptcy Rules, 1886, the previous practice in bankruptcy remains in force; and the Rules of the Supreme Court do not apply. If this Court has jurisdiction, it is only, under sub-s. 8 of s. 25 of the Judicature Act, 1873, when it is just and convenient. There is no record of such an order having been made by the Court of Bankruptcy, and it is contrary to its usual practice to do so. At any rate, no special grounds are shewn for making the order in this case.

(1) 11 Q. B. D. 711. (2) 43 Ch. D. 131.

Romer Macklin, in reply.

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In re GOUDIE. *Ex parte* OFFICIAL RECEIVER.

VAUGHAN WILLIAMS J. I am asked to appoint a receiver by way of equitable execution to enforce an order of this Court for payment of a sum of money. It is said that such an order has not been made before by the Court of Bankruptcy, although it has frequently been made in the Chancery Division. Now, as early as the Bankruptcy Act, 1869, the Court of Bankruptcy was a court of equity as well as a court of law, and one would think that a Court having equitable jurisdiction would have power to make such an order. Equitable execution is granted because execution at law cannot be obtained. Certainly, it is rather odd that this power has never before been exercised by the Court of Bankruptcy; but in my judgment this Court has power under s. 25, sub-s. 8, of the Judicature Act, 1873, and rules 3 and 28 of Order XLII. of the Rules of the Supreme Court, 1883, to appoint a receiver by way of equitable execution in a proper case. I have to exercise a discretion in the matter, and under the circumstances I think this is a proper case in which to make the order. The debtor, H. Stroud, must pay the costs of this application.

Solicitors for trustee: *Adams & Adams.*
Solicitor for trustees of the will: *A. P. Price.*

H. L. F.

1896
Aug. 11.

In re YOUNG.
Ex parte JONES.

Bankruptcy—Loan or Partnership—Agreement for a Partnership—Loan to Trader—Weekly Payments of fixed Sum out of Profits—"Share of Profits"—The Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-s.* 3 (*d*); *ss.* 3, 10.

A contract that a person shall receive a fixed sum "out of the profits" of a business is equivalent to a contract that he shall receive "a share of the profits" within the meaning of sub-s. 3 (*d*) of s. 2 of the Partnership Act, 1890.

Under a written contract A. lent B. 500*l.* for his business. A. was to have the sole control and management of the business, and an option was given him (which was not exercised) of becoming a partner with B. in the business within a certain time. For the use of his money A. was to be paid the weekly sum of 3*l.*, afterwards reduced to 2*l.*, "out of the profits" of the business. B. was to draw like weekly sums. B. having become bankrupt, A. claimed to prove for the money he had advanced:—

Held, that, under the circumstances, A. was not a partner; but that he was in the position of a person who was receiving a "share of the profits" of the business within the meaning of the Partnership Act, 1890, s. 2, sub-s. 3 (*d*), and therefore could not prove until all the other creditors had been satisfied.

THIS was an appeal against the decision of the trustee in bankruptcy refusing to admit a proof under these circumstances.

By an agreement dated September 21, 1895, and made between F. Young of the one part and A. L. Jones of the other part, after reciting (amongst other things) that F. Young had made proposals to A. L. Jones for him to enter into partnership with him in his business of a manufacturing confectioner, and an agreement had been come to with a view to such partnership being entered into at the option of the said A. L. Jones within a period of three months from September 28 inst., it was agreed between the parties (inter alia) as follows:—

"2. The said A. L. Jones shall during the period of three months (subsequently extended to seven months) from the said 28th of September, at such times as he may be able to do

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so, take charge of the office work of the said business and keep the books and accounts thereof, and manage and control the financial arrangements and affairs thereof, and shall be entitled to draw and be paid out of the profits of the business for such services the sum of 3*l.* per week, and the said A. L. Jones shall have the right at any time during the said term of three months (afterwards seven months) to declare his option to enter into partnership with the said F. Young, and thereupon the said F. Young and A. L. Jones shall execute a deed of partnership in the form of the deed hereunto annexed, and the partnership shall thereupon commence as from the 28th day of September inst., and the arrangement created by this agreement shall be at an end.

"3. The said A. L. Jones shall on the signing of this agreement pay into a banking account to be opened in his name at the . . . . Bank the sum of 500*l.*, which is to be treated as an advance of capital to the said business, and is to be used under the superintendence and control of the said A. L. Jones in defraying the trade business debts to be shewn in the balance-sheet . . . . and in discharging the current business liabilities from time to time during the continuance of this agreement, and there is to be paid to the said A. L. Jones out of the profits of the business during the continuance of this agreement for the use of the said sum of 500*l.* the weekly sum of 3*l.*; but in the event of the said A. L. Jones declaring his option to enter into such partnership as aforesaid, then the said sum of 500*l.* is to be dealt with and treated as in the said deed of partnership is provided.

"4. The said F. Young shall also be entitled during the continuance of this agreement to draw from the profits of the business the weekly sum of 3*l.*

"5. All cash received during the continuance of this agreement shall be paid into the said banking account so to be opened by the said A. L. Jones as aforesaid, and no debt or engagement shall be created or entered into by the said F. Young during the continuance of this agreement without the previous consent of the said A. L. Jones."

In accordance with this agreement A. L. Jones advanced

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500*l.* on September 29, 1895, and between that date and February 1, 1896, he made further advances. The sums advanced amounted in the whole to 663*l.*

The business was carried on under the name of F. Young & Co. The option reserved to A. L. Jones was never exercised by him. In December, 1895, the weekly drawings were reduced from 3*l.* each to 2*l.* each.

On March 19, 1896, a receiving order was made against F. Young, and he was subsequently adjudicated a bankrupt.

In April, 1896, A. L. Jones carried in a proof for the 663*l.*, which was rejected by the trustee in bankruptcy on the grounds that (1.) Jones was in fact a partner of F. Young; and that (2.), if not a partner, yet he was a person coming within s. 2, sub-s. 3 (*d*), and s. 3 of the Partnership Act, 1890. (1)

A. L. Jones appealed.

Ashton Cross, for the appellant. In the first place, Jones was not a partner. The agreement was not intended to operate as a partnership. A partnership was only contemplated if and when Jones exercised the option given him by the agreement; but it was never exercised.

(1) The Partnership Act, 1890, provides:—

Sect. 2: "In determining whether a partnership does or does not exist, regard shall be had to the following rules . . . .

"(3.) The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular . . . . (*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto. . . .

Sect. 3: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . . being adjudged a bankrupt . . . . the lender of the loan shall not be entitled to recover anything in respect of his loan . . . . until the claims of the other creditors of the borrower . . . . for valuable consideration in money or money's worth have been satisfied."

[VAUGHAN WILLIAMS J. referred to *Pooley* v. *Driver*. (1)]

The agreement must be looked at as a whole to see whether or not the parties intended a partnership. Here, the effect of the agreement was to constitute Jones the manager, with large powers of control, no doubt, but still only the manager; and his salary was not a share of the profits, but a fixed weekly payment. Secondly, Jones was not a partner or a person who had advanced money to a business on the terms that he should receive "a share of the profits" within the meaning of ss. 2 and 3 of the Partnership Act, 1890. The term "share of profits" is generally used to indicate a certain per-centage or rate of the whole of the profits, and not, as here, small fixed weekly payments payable out of profits.

Hansell, for the trustee. Jones was a partner. The onus is on him to shew either that the relationship of master and servant existed between him and Young, or that there was a loan. The business was being carried on in the name of Young with a view to making a profit for both. A partner's functions were assigned to Jones. He had sole control of the business, and he was the only person who could accept bills. The clause giving Jones an option to become a partner was merely inserted with the view to negative a partnership; but that will not avail him if, in fact, there was a partnership: *Ex parte Hamper* (2); *Pooley* v. *Driver* (1); *Cox* v. *Hickman* (3); *Courtenay* v. *Wagstaff* (4); *Moore* v. *Davis*. (5) Here, having regard to all the circumstances, there was a partnership. But if not, then Jones was a person who had advanced money to the business on the terms that he should receive "a share of the profits," and cannot prove until after all the other creditors of Young have been satisfied.

Ashton Cross, in reply.

VAUGHAN WILLIAMS J. The question in this case is whether the trustee was right in rejecting the proof of Mr. Jones. The question depends upon the Partnership Act, 1890, and its

(1) 5 Ch. D. 458.
(2) 17 Ves. 403.
(3) 8 H. L. C. 268.
(4) 16 C. B. (N.S.) 110.
(5) 11 Ch. D. 261.

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effect on the agreement entered into between Mr. Young and Mr. Jones in September, 1895. The trustee makes two allegations with reference to this agreement. First, he says that it was a partnership; and, secondly, that, if it was not, it was an agreement for a loan of money falling within s. 3 of the Partnership Act, 1890. I will deal first with the question as to whether there was a partnership. [The learned judge read s. 2, sub-s. 3, of the Act, and continued:—]

It is common ground, putting it at the lowest, that the agreement did provide for the payment to Mr. Jones of a sum contingent upon the profits of the business, because under clause 2 he was to be entitled to draw out and to be paid out of the profits of the business for his services a sum of 2*l.* per week. [The learned judge then read clause 3 of the agreement, and continued:—]

It seems to me clear, therefore, that Mr. Jones was to be entitled to a "payment contingent on or varying with the profits of" the business. It seems to me also quite clear that the receipt of such a payment is primâ facie evidence that Mr. Jones was a partner in the business. It was urged by Mr. Ashton Cross that it was only the receipt by a person of a share of the profits which was primâ facie evidence of partnership, and that it was not affirmatively stated that the receipt of a payment contingent on profits should be primâ facie evidence of partnership. I do not think that is so. It seems to me impossible to read the section without seeing that the receipt of a sum contingent on the profits of the business is to be primâ facie evidence of partnership, although it does not of itself make the recipient a partner in the business. I am therefore going to deal with the agreement on the basis that the receipt of these payments—originally 3*l.*, but afterwards reduced to 2*l.* per week—is primâ facie evidence of a partnership. It was said, however, by Mr. Ashton Cross that, although that might be so, yet I ought to look at the agreement as a whole and to hold, notwithstanding this primâ facie evidence, that there was in fact no partnership. It was said that the agreement, taken as a whole, negatived the existence of a partnership. That it was plain that the agreement was made

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with reference to a contemplated partnership, and that under it Mr. Jones had an option of entering into partnership, which he did not exercise. On the other hand, it was contended by Mr. Hansell that, if the various provisions of the agreement were looked at, it would be seen that such large powers of control were conferred upon Mr. Jones as were only consistent with his being a partner. I have read the agreement very carefully, and on this point I think the contention of Mr. Ashton Cross is the right one. Although, therefore, I am of opinion that there is primâ facie evidence of a partnership within the meaning of s. 2 of the Act, yet, on the whole, I think I ought not to hold that the presence of the clauses giving these large powers of control shews that a partnership was intended by the parties. I have come, therefore, to the conclusion that it was not the intention of the parties to the agreement that there should be any partnership until Mr. Jones had exercised the option given him by the agreement of becoming a partner.

I have next to consider whether the 500*l.* was a "loan" within the meaning of s. 3 of the Partnership Act, 1890. That section provides that "in the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . . being adjudged a bankrupt . . . . the lender of the loan shall not be entitled to recover anything in respect of his loan . . . . until the claims of the other creditors of the borrower . . . . for valuable consideration in money or money's worth have been satisfied." I have therefore to refer back to see what constitutes a "loan" within the meaning of "the last foregoing section." This is found in s. 2, sub-s. 3 (*d*), which enacts that "the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto." That is the

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kind of loan contemplated. I have therefore to say whether the 500*l.* paid into the banking account by Mr. Jones was a loan to Mr. Young; and I have come to the conclusion that it was, and that it was paid on a contract under which Mr. Jones was to receive "a share of the profits." It was contended that Mr. Jones was not to receive a share of the profits, but 3*l.*, subsequently reduced to 2*l.*, per week "out of the profits." But in my judgment a contract that a person shall receive a fixed amount out of the profits is equivalent to a contract that he shall receive a share of the profits. It was suggested that a person did not receive a share of the profits unless he obtained a right to a certain rate of profits out of the whole of the profits earned. I do not see why I should so hold. The fund is distinctly fixed out of which the weekly payments were to come. It seems to me, therefore, that an agreement for the receipt of a sum out of the profits is an agreement for the receipt of a share of the profits. For these reasons I think the trustee was right in rejecting this proof. The appeal must be dismissed with costs.

Solicitors for appellant: *Wynne-Baxter & Keeble.*
Solicitor for trustee: *L. J. Williams.*

H. L. F.

ELGOOD *v.* HARRIS AND ANOTHER.

1896
June 15, 26.

Bankruptcy—Underwriter—Insurance Brokers—Claim by Trustee for Salvage —Right to set off Unpaid Losses.

The trustee in bankruptcy of an underwriter sued insurance brokers, who had effected policies with the underwriter, for moneys which had come into their hands since the bankruptcy as salvage in respect of losses which had been paid by the underwriter before his bankruptcy. The brokers claimed to set off losses on other policies effected by them with the underwriter, which, in consequence of his bankruptcy, they had had to make good to their principals, to whom they had guaranteed the solvency of the underwriter:—

Held, that the brokers were not entitled to set off these losses, since the sums received by way of salvage were part of the bankrupt's estate, which they only held as trustees for him.

ACTION tried before Collins J. in the Commercial Court.

The plaintiff was the assignee of the trustee in bankruptcy of an underwriter who had become bankrupt. The defendants were insurance brokers. In the ordinary course the defendants had effected with the underwriter, who was a member of Lloyd's, policies of insurance as well in their own names as for their principals, to whom they guaranteed the solvency of the underwriter.

The action was brought to recover moneys received by the defendants by way of salvage in respect of losses on some of these policies settled before the bankruptcy between the underwriter and the defendants.

The defendants claimed to set off a much larger sum due to them for losses on other policies effected by them with the underwriter which, in consequence of the bankruptcy, they had had to pay to their principals, to whom they had guaranteed the solvency of the underwriter.

Joseph Walton, *Q.C.*, and *Manisty*, for the plaintiffs. The only question is as to the set-off. The defendants are no doubt entitled to set off losses which are not paid by the bankrupt against any claim upon them based on a credit given to them by the bankrupt at the date of the bankruptcy; but the claim

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for this salvage is not based on any such credit. It is a claim by the trustee in bankruptcy to get in property belonging to the bankrupt which came into the hands of the defendants after the bankruptcy.

[They cited *Ex parte Rhodes* (1); *Ex parte Young* (2); *Young* v. *Bank of Bengal* (3); *Parker* v. *Smith* (4); *Naoroji* v. *Chartered Bank of India*. (5)]

Herbert Reed, Q.C., and *Reginald Brown*, for the defendants. The claims of the plaintiff and the defendants arise out of the same relations and, being mutual, can be set off. Salvage always goes in diminution of the liability of the underwriter. Here the underwriter, having become insolvent, has been unable to meet his liabilities, and the defendants have had to make good the losses to their principals. They are, therefore, entitled to the salvage that has come into their hands. They would certainly be entitled to this set-off if the action had been brought by the underwriter himself.

[They cited *Lee and Chapman's Case* (6); *Booth* v. *Hutchinson*. (7)]

Joseph Walton, Q.C., replied.

Cur. adv. vult.

June 26. COLLINS J. read the following judgment:—This is a claim by a person who has taken an assignment from the trustee of a bankrupt underwriter for additional premiums due from the defendants, who are insurance brokers, upon policies effected by them with the bankrupt, and for moneys received by them by way of salvage upon losses settled with the underwriter before the bankruptcy. The bankrupt was a member of Lloyd's, and business was done between him and the defendants in the ordinary manner, which is described in Arnould on Marine Insurance, Part. I. c. 4. The defendants seek to set off against this claim a much larger sum due to them for losses on other policies effected by them as well in their own names as for their principals, to whom they guaranteed the solvency of

(1) 15 Ves. 539.
(2) 41 L. T. 40.
(3) 1 Moo. P. C. 150.
(4) 16 East, 382.
(5) L. R. 3 C. P. 444.
(6) 30 Ch. D. 216.
(7) L. R. 15 Eq. 30.

the underwriter. It was admitted by the plaintiff that the defendants, having effected the policies in their own names and having guaranteed the solvency of the underwriter, were entitled to set off unpaid losses against any claim upon them based on a credit given by the bankrupt to them at the date of the bankruptcy; and they did not dispute that the claim for additional premiums, which became payable after the bankruptcy under policies effected before the bankruptcy, was based on such a credit, and was therefore met by the set-off. The plaintiff contended, however, that the claim for salvage stood upon a different footing, and was in effect a mere demand by the trustee to get in property of the bankrupt which had come to the hands of the defendants after the bankruptcy—a right which arose for the trustee as soon as and not before such property came into the hands of the defendants, and was therefore in no sense based upon a credit given by the bankrupt, and consequently could not be met by a set-off of sums due from the bankrupt in respect of losses underwritten by him, whether they accrued before or after the bankruptcy. Such losses, if occurring before bankruptcy, would at the date of the bankruptcy be a debt presently payable by the underwriter to the defendants; if occurring after bankruptcy, would found a credit given by the defendants to the bankrupt; that the debt or credits, therefore, were not mutual, the claim of the plaintiff being one that first accrued to the trustee as assignee of the bankrupt's estate, the claim of the defendants being based on a credit given to the bankrupt himself. The point is one of some nicety, and involves an analysis of the exact position of the parties towards each other at the date of the bankruptcy. At that date the losses on all the policies in respect of which salvage is claimed had been paid in account as between the underwriter and the defendants. On the other hand, there were several policies underwritten by the bankrupt upon which he was liable to make good losses.

The effect of payment by the underwriter to the defendants, who as between them and the underwriter are claiming rights of set-off as being themselves the persons insured, was as against them to vest in the underwriter an equitable right to all

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Collins J

property or interest which they might have in the thing insured. Therefore, at the date of the bankruptcy the underwriter was the owner in equity, subject perhaps to disclaimer by him of whatever existed of the thing insured, and the defendants became trustees for him of anything which they might receive in respect thereof in diminution of the loss: see per Lord Blackburn in *Burnand* v. *Rodocanachi* (1); Phillips on Insurance, § 1723, et seq. I think it is immaterial for this purpose whether his right was legal or equitable. He had by payment become the true owner of the subject-matter insured, and of anything that might be received by the assured in respect of it, as soon as it came into existence. When, therefore, sums were received by the defendants by way of salvage, those sums became part of the bankrupt's estate which his trustee was entitled to get in; but the defendants were under no contract to enforce payment of such sums for the benefit of the bankrupt. They had simply divested themselves of all interest in or rights in respect of the subject-matter except as trustees for the bankrupt. As such trustees they could be called upon to hand over anything which came to their hands in diminution of the loss; but at the date of the bankruptcy no debt existed, and no credit was given to them by the bankrupt in respect thereof, nor could their obligation as trustees be said, I think, to be a money claim arising out of a mutual dealing, as described by Lord Esher M.R. in *Eberle's Hotels Co.* v. *Jonas*. (2) Suppose the defendants had executed a deed transferring the wreck to the underwriter, and that after his bankruptcy some part of the wreck had come into the possession of the defendants, would not this have been the subject of a claim arising for the trustee when, and not before, the defendants got possession? Would it make any difference that the thing saved and held by them was money, so that it could be sued for as money had and received? Clearly not. It would still be part of the bankrupt's estate which had found its way into the hands of the defendants after bankruptcy, and in respect of which no debt or credit had ever existed between the defendants and the bankrupt. Is there, then, any difference in the position of the parties because the

(1) 7 App. Cas. 333, at p. 339. (2) 18 Q. B. D. 459, at p. 465.

right of the trustee in bankruptcy is not based upon a legal assignment, but upon an equity arising out of the contract of indemnity, but based on the fact that a complete indemnity had been paid? I cannot think that the obligation to admit this equity, which arose by operation of law when the defendants received such payment, could be deemed in any sense a credit given by the bankrupt to them or a money claim existing for him in respect of mutual dealings with them.

In analyzing the relation of the underwriter to the defendants at the date of the bankruptcy for the purpose of determining the question of set-off, I carefully exclude considerations based on the fact that the defendants were also agents for the underwriter, who, had he not become bankrupt, might in ordinary course have received on his behalf salvage in the form of money compensation. Such agency, so far as it existed, was revoked by the bankruptcy: see *Parker* v. *Smith* (1); *Minett* v. *Forrester* (2); and no claim of mutual credit or mutual dealing based on its expected continuance can be supported. I have also excluded all consideration of the rights of the defendants as between them and their clients, for whom the insurances were in fact effected. These latter may or may not have been bound by the custom of Lloyd's: see *Scott* v. *Irving* (3); *Stewart* v. *Aberdein* (4); but this case is to be considered entirely apart from them upon the basis upon which the defendants have placed it, namely, that of persons insured who have a claim as such to be paid losses, but who in respect of other losses have received indemnity. Such being my view of the law, my judgment must be for the plaintiff for 37*l.* 6*s.* 10*d.*, which was the figure agreed between the parties if the plaintiff was entitled to succeed.

Judgment for plaintiff.

Solicitors for plaintiff: *Elgood & Moyle.*
Solicitors for defendants: *Turner, Son & Foley.*

(1) 16 East, 382.
(2) 4 Taunt. 541.
(3) 1 B. & Ad. 605.
(4) 4 M. & W. 211.

A. P. P. K.

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ADULTERATION—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 9—*Sale of Article of Food in altered state—Disclosure of Alteration—Mens rea.*

By s. 9 of the Food and Drugs Act, 1875, "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

The appellants, a firm of refreshment contractors, entered into a contract with a dairy company for the supply to them of milk; the contract containing a warranty by the company as to the purity of the milk to be supplied. Milk was delivered under the contract at a refreshment room of the appellants; it was handed in a can to one of their servants, who poured a portion of it into a churn, which was placed on the counter for the purpose of the milk being sold to customers; it was so poured that a less proportion of cream was in the milk that went into the churn than in the milk which remained in the can. The respondent bought a glass of milk at the counter; the milk was drawn from the churn,

ADULTERATION—*continued.*

and on analysis shewed a deficiency of 17 per cent. of cream. Upon the glass in which the milk was served were engraved the words "Not guaranteed as new or pure milk or with all its cream, see notices"; and upon the refreshment counter was a printed notice to the effect that all milk sold by the appellants was purchased by them under a warranty of its purity and genuine quality; that they took all possible precautions to ensure its supply to their customers in proper condition, but were unable to guarantee it as new, pure, or with all its cream, and did not, therefore, sell it as such :—

Held, that, assuming that the facts showed an abstraction from the milk, there had been a sufficient disclosure by the appellants of the alteration to satisfy the requirements of the section.

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ATTORNMENT — Tenancy at will — Power to enter and determine the tenancy - 162
See MORTGAGE.

BAILMENT — Chattels for hire — Validity of assignment as against trustee - 254
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BANK—Guarantie to bank—Surety for bankruptcy debt, but liability limited in amount 12
See BANKRUPTCY. 7.

BANKRUPTCY—*Act of Bankruptcy—Non-trader —Notice of Intention to suspend Payment—Solicitor's Letter—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

Sect. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, which enacts that a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts, applies to non-traders as well as to traders.

Judgment creditors having pressed the debtor for payment and threatened to levy execution, he offered them a second mortgage on his freehold estates as security, and with a view thereto his solicitors wrote to the solicitors of the judgment creditors as follows: "As promised we send you herewith statement showing income and expenditure and amount of the mortgages on the estates. We think it well to repeat what we stated to you at our interview that a receiving order will be applied for immediately execution is issued." The security offered was declined, and shortly afterwards the judgment creditors issued execution. The debtor at once presented a bankruptcy petition and obtained a receiving order. The trustee in bankruptcy claimed moneys paid to the debtor's solicitor between the date of the letter and of the receiving order, on the ground that the letter was an act of bankruptcy and that his title related back thereto:—

Held, that the letter did not amount to a notice of suspension or of intention to suspend payment, and therefore was not an act of bankruptcy. TRUSTEE OF LORD HILL *v.* ROWLANDS 124

BANKRUPTCY—*continued.*

2. —— *Bailment of Chattels for Hire—Equitable Assignment by Bailor of Future Payments under Hiring—Bankruptcy of Bailor—Validity of Assignment as against Trustee.*

A trader, having let out goods on hire under a contract for a fixed weekly sum, assigned her right to receive payments under the contract to a third person as security for an advance. Before any moneys were payable by the hirer under the contract the trader became bankrupt:—

Held, that the assignment gave no title as against the trustees in bankruptcy to any money which might become due after the commencement of the bankruptcy. WILMOT *v.* ALTON - 254

3. —— *Bankruptcy Notice—Foreigner out of Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 6, *sub-s.* 1 (*d*).

A bankruptcy notice was issued under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*), against a foreigner who had not ordinarily resided or had a dwelling-house or place of business in England within the preceding year and was then abroad. The debtor subsequently coming to England temporarily, he was served with the bankruptcy notice in this country:—

Held, that the issue of the bankruptcy notice was valid. *In re* CLARK. *Ex parte* BEYER, PEACOCK & CO. - - - - C. A. 476

4. —— *Costs—Security for—Practice—Appeal from Receiving Order — Application to increase Security for Costs—"Special Circumstances"—The Bankruptcy Rules*, 1886, *r.* 131.

Where a debtor appeals from a receiving order made against him and lodges in court the sum of 20*l.* prescribed by rule 131 as security for the costs of the appeal, the fact that the respondent's costs of the appeal out of pocket will alone exceed 20*l.* is not a special ground for increasing the amount of the deposit.

In re McHenry (17 Q. B. D. 351) distinguished. *In re* PHILLIPS. *Ex parte* TREBOETH BRICK COMPANY - - - - - 122

5. —— *Married Woman — "Carrying on a Trade"— Receiving Order — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

By s. 1, sub-s. 5, of the Married Women's Property Act, 1882, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

A married woman having carried on a trade separately from her husband sold the business. Shortly afterwards she gave notice to her credi-

BANKRUPTCY—*continued.*
tors that she was about to suspend payment of her debts, and thereupon a bankruptcy petition was presented against her by two creditors in respect of trade debts incurred by her prior to the sale:—

Held, that a receiving order might be made against her—

By Vaughan Williams J. on the ground that the fact of her having trade debts undischarged at the date of the petition was evidence from which it ought to be inferred that she was still carrying on the trade at that date:

By Wright J. on the ground that having once carried on a trade she continued, even after she had ceased to carry it on, to be subject to the bankruptcy laws in respect of the debts incurred by her during the period of her trading. *In re* DAGNALL. *Ex parte* SOAN AND MORLEY - **407**

6. —— *Proof—Partnership, Agreement for a—Loan or Partnership—Loan to Trader—Weekly Payments of fixed Sum out of Profits—"Share of Profits"—"Loan"—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-s.* 3 (*d*); *ss.* 3, 10.

A contract that a person shall receive a fixed sum "out of the profits" of a business is equivalent to a contract that he shall receive "a share of the profits" within the meaning of sub-s. 3 (*d*) of s. 2 of the Partnership Act, 1890.

Under a written contract A. lent B. 500*l.* for his business. A. was to have the sole control and management of the business, and an option was given him (which was not exercised) of becoming a partner with B. in the business within a certain time. For the use of his money A. was to be paid the weekly sum of 3*l.*, afterwards reduced to 2*l.*, "out of the profits" of the business. B. was to draw like weekly sums. B. having become bankrupt, A. claimed to prove for the money he had advanced:—

Held, that, under the circumstances, A. was not a partner; but that he was in the position of a person who was receiving a "share of the profits" of the business within the meaning of the Partnership Act, 1890, s. 2, sub-s. 3 (*d*), and therefore could not prove until all the other creditors had been satisfied. *In re* YOUNG. *Ex parte* JONES - - - - - - **484**

7. —— *Proof — Principal and Surety — Guarantie to Bank—Surety for whole Debt, but Liability limited in Amount—Payment by Surety—Proof by Bank for whole Debt.*

A surety guaranteed a bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from their customer S., but nevertheless the total amount recoverable from the surety was not to exceed 300*l.* The guarantie was to be a continuing security, and any dividends which the bank might receive on the bankruptcy of S. were not to prejudice their right to recover from the surety to the full extent of the guarantie any sums which after the receipt of such dividends might remain owing to them by S.

S. became bankrupt, and the bank, after receiving the 300*l.* from the surety, claimed to prove in the bankruptcy for the full amount due to them from S. The trustee in bankruptcy contended that the proof ought to be reduced by

BANKRUPTCY—*continued.*
the amount the bank had received from the surety:—

Held, that the bank were entitled to prove for their whole debt without any deduction. *In re* SASS. *Ex parte* NATIONAL PROVINCIAL BANK OF ENGLAND - - - - - - **12**

8. —— *Proof, right to Amend—Secured Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., rr.* 12 (*a*), 13.

By the Bankruptcy Act, 1883, Sched. II., r. 12 (*a*), where a secured creditor has valued his security the trustee may "at any time" redeem it on payment to the creditor of the assessed value; and by rule 13 a secured creditor may "at any time" amend his valuation and proof on shewing that the security has increased in value since its previous valuation. A secured creditor having valued his security, it subsequently greatly increased in value, and thereupon the trustee gave notice to redeem it, and tendered payment of the assessed value to the creditor, who refused to accept the tender:—

Held, that the creditor was entitled, under rule 13, to amend his valuation and proof notwithstanding such tender and refusal. *In re* NEWTON. *Ex parte* NATIONAL PROVINCIAL BANK OF ENGLAND - - - - - - **403**

9. —— *Receiver—Appointment of—Equitable Execution — Practice — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Bankruptcy Rules*, 1886, *rr.* 93, 353—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 93.

The Court of Bankruptcy has jurisdiction under s. 25, sub-s. 8, of the Judicature Act, 1873, to appoint a receiver by way of equitable execution for the purpose of enforcing orders for the payment of money to the trustee in bankruptcy; but such an order will not, as a general rule, be made on an ex parte application. *In re* GOUDIE. *Ex parte* THE OFFICIAL RECEIVER - - **481**

10. —— *Set-off — Underwriter — Insurance Brokers—Claim by Trustee for Salvage—Right to set off Unpaid Losses.*

The trustee in bankruptcy of an underwriter sued insurance brokers, who had effected policies with the underwriter, for moneys which had come into their hands since the bankruptcy as salvage in respect of losses which had been paid by the underwriter before his bankruptcy. The brokers claimed to set off losses on other policies effected by them with the underwriter, which, in consequence of his bankruptcy, they had had to make good to their principals, to whom they had guaranteed the solvency of the underwriter:—

Held, that the brokers were not entitled to set off these losses, since the sums received by way of salvage were part of the bankrupt's estate, which they only held as trustees for him. ELGOOD *v.* HARRIS - - - - - **491**

—— Examination—Parol evidence of bankrupt's admissions - - - - **260**
See CRIMINAL LAW. 1.

BANKRUPTCY RULES, 1886, rr. 93, 353 - **481**
See BANKRUPTCY. 9.

—— **r. 131** - - - - - **122**
See BANKRUPTCY. 4.

BENEFICE—Augmentation of — Charge upon land - - - - - 129
See RENT-CHARGE.

BILL OF LADING—Excepted perils—Restraint of princes - - - - 326
See SHIP. 1.

BILL OF SALE—*Affidavit of Execution—Sworn before Solicitor of Grantee—Validity of Bill—Practice—Order XXXVIII., r.* 16—"*Party.*"

By Order XXXVIII., r. 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used":—

Held, that the above rule applies to affidavits of execution of bills of sale, and that consequently if an affidavit of execution be sworn before the solicitor acting for the grantee in the preparation of the bill, the bill of sale will be void. BAKER *v.* AMBROSE - - - - - - 372

BROKER—Salvage — Right to set off unpaid losses - - - - 491
See BANKRUPTCY. 10.

BUILDING—Erection of new — By-laws — Validity - - - - 85
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—— Party wall—Metropolis - - 271
See LONDON. 1.

—— Plans—Refusal of local authority to approve - - - - 451
See LOCAL GOVERNMENT. 3.

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CASES—*Attorney-General* v. *Chambers* (4 D. M. & G. 206; 4 De G. & J. 55) referred to - - - - - 360
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—— *Bridges* v. *Hawkesworth* (21 L. J. (Q.B.) 75) distinguished - - - 44
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—— *Bursill* v. *Tanner* (16 Q. B. D. 1) discussed - - - - 338
See HUSBAND AND WIFE. 1.

—— *Castellain* v. *Preston* (11 Q. B. D. 380) discussed - - - - 377
See INSURANCE, FIRE.

—— *Chennell, In re. Jones* v. *Chennell* (8 Ch. D. 492) explained - - - 301
See COUNTY COURT. 2.

—— *Darrell* v. *Tibbitts* (5 Q. B. D. 560) discussed - - - - 377
See INSURANCE, FIRE.

—— *Elsee* v. *Smith* (1 D. & R. 97) followed 418
See JUSTICES.

—— *Hill* v. *Hair* ([1895] 1 Q. B. 906) disapproved - - - - 205
See LOCAL GOVERNMENT. 2.

—— *Holliday and the Mayor, &c., of Wakefield, In re* (20 Q. B. D. 699; [1891] A. C. 81) inapplicable - - - 439
See LANDS CLAUSES ACTS. 3.

—— *Honduras Railway Co.* v. *Tucker* (2 Ex. D. 301) followed - - - 464
See PRACTICE. 7.

CASES—*continued.*

—— *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559) discussed - - - - 48
See HUSBAND AND WIFE. 2.

—— *Hood Barrs* v. *Heriot* ([1896] A. C. 174) discussed - - - - 48
See HUSBAND AND WIFE. 2.

—— *McHenry, In re* (17 Q. B. D. 351) distinguished - - - - 122
See BANKRUPTCY. 4.

—— *Massey* v. *Heynes & Co.* (21 Q. B. D. 330) followed - - - - 464
See PRACTICE. 7.

—— *Mulliner* v. *Midland Railway Co.* (11 Ch. D. 611) commented on - - 439
See LANDS CLAUSES ACTS. 3.

—— *Parnell* v. *Walter* (24 Q. B. D. 441) overruled on one point - - - 148
See PRACTICE. 5.

—— *Reg.* v. *Gloucester* (*Justices of*) (68 L. T. (N.S.) 225) approved - - 306
See LICENSING ACTS.

—— *Reg.* v. *Master* (L. R. 4 Q. B. 285) doubted
See PRACTICE. 3. 344, at p. 352

—— *Self* v. *Hove Commissioners* ([1895] 1 Q. B. 685) followed - - - 205
See LOCAL GOVERNMENT. 2.

—— *Smurthwaite* v. *Hannay* ([1894] A. C. 494) referred to - - - - 464
See PRACTICE. 7.

—— *Stebbing* v. *Metropolitan Board of Works* (L. R. 6 Q. B. 37) distinguished 469
See LANDS CLAUSES ACTS. 2.

—— *Strong, In re* (31 Ch. D. 273) referred to
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—— *Tottenham Local Board* v. *Rowell* (1 Ex. D. 514) held undistinguishable - 278
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—— *Vernon* v. *Cooke* (49 L. J. (C.P.) 767) distinguishable and semble, no longer the law - - - - - 372
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—— *Wallasey Local Board* v. *Gracey* (36 Ch. D. 593) approved - - - 353
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—— *West* v. *Downham* (14 Ch. D. 111) followed - - - - 412
See LOCAL GOVERNMENT. 4.

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COLLIERY—Subscriptions to coal owners' associations—Income tax - - 79
See REVENUE. 2.

COMPANY—Notice of application to interrogate member - - - - 153
See PRACTICE. 4.

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CONDITION—Discretion to attach, to grant of licence - - - - 386
See THEATRE.

CONSERVATORS—Rights of owner of shore 360
See THAMES.

CONTRACT—Implied condition as to fitness of goods - - - - 59
See SALE OF GOODS.

COPYHOLD—*Heriot Service.*
A right in the lord of a manor to take a heriot as due by heriot service may exist as well in the case of copyhold as in that of freehold tenements of the manor. WESTERN *v.* BAILEY - 234

COSTS — Administration action — Discretion of registrar—Insolvency of estate - 301
See COUNTY COURT. 2.

—— Appeal from licensing justices — Non-appearance at sessions - - 306
See LICENSING ACTS.

—— Lands Clauses Acts - - 432, 439
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—— Nuisance order—Limitation of actions 278
See LONDON. 2.

—— Security for—Appeal—Attachment - 375
See PRACTICE. 2.

—— Security for—Appeal from receiving order
See BANKRUPTCY. 4. 122

COUNTY COUNCIL—Offices of—Rateability 143
See POOR-RATE. 1.

COUNTY COURT—*Appeal—Claim not exceeding 20l. — Counter-claim exceeding 20l. — Right of Appeal without Leave—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.
The absolute right of appeal given by s. 120 of the County Courts Act, 1888, in actions of contract and tort, where the debt or damage claimed exceeds 20*l.*, extends to cases where the defendant's counter-claim exceeds 20*l.*, although the claim of the plaintiff is below that amount. SMITH *v.* GILL - - - 166

2. —— *Costs—Administration Action—Discretion of Registrar over Taxation—Insolvency of Estate—County Court Rules*, 1889, *Order* L. *A, r.* 20.
The costs of the administrator in an administration action in the county court are discretionary fees or allowances within the meaning of Order L. A, r. 20, of the County Court Rules, 1889. Upon the taxation of such costs the registrar may take into account the fact that the estate is insolvent, and may disallow items which would be allowed in the case of a solvent estate.
Per Wills J.: In such a case the administrator's right to costs should be confined to such costs as are necessary for the protection of the estate. PAIN *v.* BOWDEN - - - 301

3. —— *Jurisdiction—Neglect to Levy Execution—Action against High Bailiff—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 35, 43, 49.
An action will lie to recover damages against the high bailiff of a county court, at the suit of a party aggrieved by his neglect in the performance of his duties as high bailiff, notwithstanding the provisions of s. 49 of the County Courts Act, 1888, enabling the county court judge, in such cases, to order the high bailiff to pay damages to the party aggrieved. WATSON *v.* WHITE 9

—— Interrogatories—Pollution of rivers - 297
See PRACTICE. 6.

COUNTY COURT RULES, 1889:—
—— **Order III., r. 1.** - - - 113
See PRACTICE. 8.

—— **Order XLIV., r. 18.** - - - 113
See PRACTICE. 8.

—— **Order L. A, r. 20** - - - 301
See COUNTY COURT. 2.

COVENANT—Not to assign without licence—"Unreasonably withheld" - 241
See LANDLORD AND TENANT.

"CRIMINAL CAUSE OR MATTER"—Appeal—Poor-rate - - - - 344
See PRACTICE. 3.

CRIMINAL LAW—*Evidence—Bankrupt — Admissibility—Public Examination of Bankrupt—Parol Evidence of Bankrupt's Admissions — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17, *sub-s.* 8.
By s. 17, sub-s. 8, of the Bankruptcy Act, 1883, on the public examination of a debtor he "shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him":—
Held, that sub-s. 8 did not exclude any other mode of proving the debtor's admissions made at his public examination; so that, on the trial of an indictment against a bankrupt for misdemeanours under the Debtors Act, 1869, where notes of his public examination had been taken but not read over by or to or signed by him, parol evidence of the person who took the notes was admissible to prove such admissions. THE QUEEN *v.* ERDHEIM - - - C. C. R. 260

2. —— *Evidence—Rape—Particulars of Complaint made by Prosecutrix.*
Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part. THE QUEEN *v.* LILLYMAN C. C. R. 167

3. —— *Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90)—*Area of Operation of Act—Pleading.*
By s. 11 of the Foreign Enlistment Act, 1870, "If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue: (1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence":—
Held, that, if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who

CRIMINAL LAW—*continued.*
assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions.

By s. 2 of the said Act, "This Act shall extend to all the dominions of Her Majesty." And by s. 3, "This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation."

An indictment alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,'" certain offences against the said Act were committed:—

Held, that the indictment sufficiently alleged the Act to have been in operation in that part of Her Majesty's dominions in which the alleged offences were committed. THE QUEEN *v.* JAMESON - - - - - - - - 425

—— Rivers, pollution of — Interrogatories — Whether proceedings civil or criminal
See PRACTICE. 6. 297

DAMAGES—*Mischievous Animal — Evidence of Scienter—Ferocious Dog—Negligence.*

In order to support an action for damages for the bite of a dog it is necessary to shew that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff: it is not sufficient to shew that it had to the defendant's knowledge attacked and bitten a goat. OSBORNE *v.* CHOCQUEEL - - 109

DELIVERY—Antecedent to gift—Essentials to gift - - - - - 283
See DONATIO MORTIS CAUSÂ.

DETINUE—*Property by Finding—Chattels found on Private Property — Ring Found in Pool of Water.*

The possessor of land is generally entitled, as against the finder, to chattels found on the land.

The defendant, while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. He declined to deliver them to the plaintiffs, but failed to discover the real owner. In an action of detinue:—

Held, that the plaintiffs were entitled to the rings.

Bridges v. *Hawkesworth* (21 L. J. (Q.B.) 75) distinguished. SOUTH STAFFORDSHIRE WATER COMPANY *v.* SHARMAN - - - - 44

DIE—For making fictitious stamp—Possession "without lawful excuse" - - 310
See POST OFFICE.

DISCOVERY—Interrogatories—Practice 148, 153, 297
See PRACTICE. 4—6.

DISCRETION—Of registrar—Costs—Insolvency of estate - - - - 301
See COUNTY COURT. 2.

—— To attach condition to grant of licence 386
See THEATRE.

DISTRESS—Poor-rate—Appeal—"Criminal cause or matter" - - - - 344
See PRACTICE. 3.

DOG—Mischievous animal—Evidence of scienter
See DAMAGES. 109

DONATIO MORTIS CAUSÂ—*Essentials to Gift—Delivery antecedent to Gift.*

The rule that delivery of a chattel is essential in order to constitute a valid donatio mortis causâ is satisfied by an antecedent delivery of the chattel alio intuitu to the donee. CAIN *v.* MOON - 283

DRAIN—Public Health Acts 205, 412, 451
See LOCAL GOVERNMENT. 2—4.

—— Repairs—Liability - - - 319
See LONDON. 3.

DUTY—Succession duty—Annuity - 389
See REVENUE. 6.

EQUITABLE EXECUTION — Practice — Receiver
See BANKRUPTCY. 9. 481

ESTOPPEL—*Ship—Marine Insurance—Judgment for Salvage in Admiralty Court—Action against Underwriter—Defence that Loss did not arise from Perils insured against.*

The captain of a steamer that had, during a voyage, run short of coal engaged a steam trawler to tow her to her port of discharge. The owner of the trawler brought an action in the Admiralty Court and recovered a sum of money for salvage. In an action by the owner of the steamer to recover, from an underwriter who had insured the ship against perils of the sea, the amount paid under the judgment:—

Held, that the defendant was not concluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against. BALLANTYNE *v.* MACKINNON - - - - - C. A. 455

EVIDENCE—Bankrupt, public examination of—Parol evidence of admission - 260
See CRIMINAL LAW. 1.

—— Rape—Particulars of complaint made by prosecutrix - - - - 167
See CRIMINAL LAW. 2.

EXAMINATION—Bankrupt's admissions, parol evidence of—Admissibility - 260
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—— Of persons other than judgment debtor—Inquiry as to separate property - 338
See HUSBAND AND WIFE. 1.

EXECUTION—Affidavit of—Sworn before solicitor of grantee—Validity - - 372
See BILL OF SALE.

—— Equitable—Receiver—Practice - 481
See BANKRUPTCY. 9.

—— Examination of persons other than judgment debtor—Inquiry as to separate property
See HUSBAND AND WIFE. 1. 338

—— Neglect to levy—Action against high bailiff
See COUNTY COURT. 3. 9

FENCE—Repair—Obligation of company to maintain - - - - - 333
See RAILWAY. 1.

FIRE INSURANCE—Subrogation—Indemnity *See* INSURANCE, FIRE. 377

FOOD AND DRUGS—Sale of food in altered state—Mens rea - - - - 65 *See* ADULTERATION.

FOOTPATH—Bridge—Mandamus - - 74 *See* RAILWAY. 2.

FOREIGN ENLISTMENT ACT, 1870—Area of operation of Act - - - 425 *See* CRIMINAL LAW. 3.

FOREIGN FIRM—Stamp—English trade-mark and goodwill - - - 356 *See* REVENUE. 5.

FOREIGNER—Out of jurisdiction—Bankruptcy notice - - - - 476 *See* BANKRUPTCY. 3.

GOODWILL—English trade-mark and—Foreign firm—Stamp - - - 356 *See* REVENUE. 5.

HERIOT—Copyholds—Heriot service - 234 *See* COPYHOLD.

HUSBAND AND WIFE—*Separate Estate—Restraint on Anticipation—Inquiry as to Separate Estate—Practice—Execution—Married Woman—Examination of Persons other than Judgment Debtor—Order* XXXVII., *r.* 28; *Order* XLII., *r.* 32.

A direction that an inquiry is to be held as to the estate of a married woman against whom judgment has been obtained, with a view to ascertain if she has separate property free from restraint on anticipation, does not authorize the examination of any person other than the judgment debtor. HOOD BARRS *v.* HERIOT. *Ex parte* BLYTH - - - - - C. A. 338

2. —— *Separate Estate—Restraint on Anticipation—Judgment against Married Woman—Arrears of Income due after Judgment—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 19.

Where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment; and the decision of the Court of Appeal to that effect in *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559) is not affected by the judgment of the House of Lords in *Hood Barrs* v. *Heriot* ([1896] A. C. 174). WHITELEY *v.* EDWARDS C. A. 48

—— Married woman trader—Receiving order 407 *See* BANKRUPTCY. 5.

—— Security for costs—Appeal—Attachment 375 *See* PRACTICE. 2.

INCOME TAX—Deductions—Colliery - 79 *See* REVENUE. 2.

INDEMNITY—Subrogation—Benefit of contract entered into by assured - - 377 *See* INSURANCE, FIRE.

INFORMATION—By whom it may be laid 104 *See* MINE.

INJUNCTION—Action for mandatory—Death of plaintiff - - - - - 159 *See* PRACTICE. 9.

INSURANCE—ACCIDENT—*Policy covering Accident sustained in discharge of Insured's Duty—Nervous Shock arising from Fright—Right to Recover under Policy.*

The plaintiff was a signalman in the employment of the defendants, a railway company, who entered into a contract of insurance with him, by which they agreed to pay a weekly allowance in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service, such insurance to be absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty. The plaintiff in the discharge of his duty endeavoured to prevent an accident to a train by signalling to the driver, and the excitement and fright arising from the danger to the train produced a nervous shock which incapacitated him from employment. In an action to recover from the defendants the weekly allowance:—

Held, that the plaintiff had been incapacitated by accident within the meaning of the policy. PUGH *v.* LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY - - - C. A. 248

INSURANCE, FIRE—*Subrogation—Indemnity—Right of Insurer to Benefit of Contract entered into by Assured—Landlord and Tenant.*

A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured, not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated. WEST OF ENGLAND FIRE INSURANCE COMPANY *v.* ISAACS - - - 377

INSURANCE, MARINE—*Life Salvage—Lloyd's Policy—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 544, 552.

Life salvage paid under the Merchant Shipping Act, 1894, s. 544, is not recoverable upon a Lloyd's policy in the usual form. NOURSE *v.* LIVERPOOL SAILING SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION C. A. 16

—— Judgment for salvage—Action against underwriter - - - - 455 *See* ESTOPPEL.

INTERROGATORIES—Practice 148, 153, 297 *See* PRACTICE. 4—6.

JOINDER OF ACTIONS—Employers' Liability Act - - - - - 113 *See* PRACTICE. 8.

JOINDER OF PARTIES—Alternative relief 464 *See* PRACTICE. 7.

JUDGMENT DEBTOR—Examination of persons other than—Practice - - 338 *See* HUSBAND AND WIFE. 1.

JURISDICTION—Appeal from licensing justices—Non-appearance at sessions - 306 *See* LICENSING ACTS.

JURISDICTION—*continued.*

—— Foreigner out of—Bankruptcy notice 476
See BANKRUPTCY. 3.

—— Neglect to levy execution—Action against high bailiff - - - 9
See COUNTY COURT. 3.

JUSTICES—*Search-warrant—Information, Sufficiency of—Allegation of reasonable Suspicion of Larceny—Legality of Warrant—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 103.

A search-warrant may be issued on an allegation of reasonable suspicion of larceny.

On an application to a justice of the peace for a search-warrant, the sworn information upon which the application was made stated that the informant "hath just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to (the informant), and that he has requested the said W. J. to allow him to search several boxes which the said W. J. has had packed ready to be taken away, and which he refuses to be looked through." The justice issued his warrant, which was executed. In an action of trespass alleging that the information was insufficient and that the warrant was consequently illegal and without jurisdiction:—

Held, that it is not necessary in such an information to allege that a larceny has in fact been committed, but that it is enough to allege a suspicion that a larceny has been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected certain property of his to have been stolen; and that it was sufficient to give the justice jurisdiction. JONES *v.* GERMAN - - - - - - 418

LANDLORD AND TENANT—*Lease—Covenant not to assign without Licence—Licence not to be unreasonably withheld—Refusal because Lessor desires Possession.*

A lease contained a covenant by the lessee not to assign without licence, "such licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee," and a clause for re-entry on breach of any of the covenants of the lease. The lessor withheld a licence to assign because he desired to obtain possession of the premises. In an action by the lessor to recover possession for breach of the covenant:—

Held, that the licence had been unreasonably withheld, and that the lessor was not entitled to recover. BATES *v.* DONALDSON - C. A. 241

LANDS CLAUSES ACTS—*Compensation—Costs—Land compulsorily taken—Costs of Arbitration—Offer made by Company—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.

A railway company seeking to acquire land under the provisions of the Lands Clauses Consolidation Act, 1845, an arbitration took place under that Act to determine the amount of compensation to be paid by them to the owner of the land. The company had previously made

LANDS CLAUSES ACTS—*continued.*

an offer of the sum of 11,000*l.* Part of the landowner's claim was in respect of damage that would be caused to the residue of his land, which was building land, by cutting it off from the natural outfall for its drainage. When the parties came before the arbitrator, it was agreed between them that a right should be reserved to the landowner of making a sewer, for the purpose of draining his land, under the railway and land of the company; and consequently no claim in respect of such damage as before mentioned was ultimately submitted to the arbitrator. The arbitrator awarded the sum of 10,029*l.* to the landowner:—

Held that, although the sum awarded was less than the amount of the company's offer, the company were liable under s. 34 of the Lands Clauses Consolidation Act, 1845, to pay the costs of the arbitration to the landowner on the ground that the award was not in respect of the same subject-matter as that in respect of which the offer was made. MILES *v.* GREAT WESTERN RAILWAY COMPANY - - - - C. A. 432

2. —— *Compensation—Land let for Public Park—Power to re-enter if compulsorily taken.*

The claimants demised land to a corporation at a low rent on condition of its being laid out and maintained as a public park. The lease contained a proviso that in case any part of the land should be compulsorily taken under the powers of any Act of Parliament it should be lawful for the claimants to re-enter upon and repossess it. Part of the land having been compulsorily taken by a railway company under the powers of an Act of Parliament:—

Held, that the claimants were entitled to the commercial value of the land taken as freed from the lease, and not merely to the capitalised value of the rent paid therefor by the corporation. *In re* AN ARBITRATION BETWEEN MORGAN AND LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - - 469

3. —— *Compensation—Railway Company—Statutory Right to take Portion of Property—Exception if "Material Detriment" to Remainder—Access over Land taken—Power of Company to grant Right of Way—Arbitration—Power of Arbitrator to consider Sufficiency of Access—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92—*Special Case stated by Arbitrator—Costs in Court of Appeal—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 20.

A railway company, under their special Act, were entitled, notwithstanding s. 92 of the Lands Clauses Consolidation Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The company gave notice to treat for a portion of certain property, and, before the arbitrator appointed under the Lands Clauses Consolidation Act to assess compensation, they undertook to provide access to the remainder of the property by means of a right of way over the portion

LANDS CLAUSES ACTS—*continued.*
taken. On a case stated by the arbitrator in his award:—

Held, that the arbitrator was entitled, in determining whether there would be "material detriment" to the remainder of the property arising from the taking of a portion, to take into consideration all the circumstances of the case, including the sufficiency of the proposed access:

Held, also, that as the giving the proposed right of way over the lands of the company was not inconsistent with the purposes for which the lands were taken, the company had power to grant it.

Mulliner v. *Midland Ry. Co.* (11 Ch. D. 611) commented on.

The Court of Appeal has power under the Arbitration Act, 1889, to deal with the costs of an appeal on an award stated in the form of a special case for the opinion of the Court.

In re Holliday and the Mayor of Wakefield (20 Q. B. D. 699; [1891] A. C. 81) no longer applies in such a case. *In re* GONTY AND MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY - - - - C. A. 439

LARCENY—Allegation of reasonable suspicion —Search-warrant - - 418
See JUSTICES.

LIBEL — Circulation of newspaper—Interrogatories - - - - 148
See PRACTICE. 5.

LICENCE—Discretion to attach condition to grant - - - - 386
See THEATRE.

LICENSING ACTS —*Appeal—Licence—Appeal from Licensing Justices—Party to Appeal—Non-appearance at Sessions—Order as to Costs of Successful Appellant — Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-s.* 5.

At a general annual licensing meeting a person objected to the renewal of a certain licence, with the result that the licence was refused. The licensed person appealed to the quarter sessions and obtained a renewal of his licence. On the hearing of the appeal the objector did not appear:—

Held (affirming the decision of the Queen's Bench Division [1896] 2 Q. B. 1), that the objector was a party to the appeal within the meaning of s. 31, sub-s. 5, of the Summary Jurisdiction Act, 1879, notwithstanding that he did not appear to oppose it, and that the court of quarter sessions had jurisdiction to order him to pay the costs of the appeal.

Reg. v. *Justices of Gloucestershire* (68 L. T. (N.S.) 225) approved. THE QUEEN *v.* JUSTICES OF KENT - - - - - C. A. 306

LIFE SALVAGE—Lloyd's policy - - 16
See INSURANCE, MARINE.

LIMITATION OF ACTIONS — Nuisance order, costs of obtaining and enforcing—Metropolis - - - - 278
See LONDON. 2.

LLOYD'S POLICY—Life salvage - - 16
See INSURANCE, MARINE.

LOAN—Partnership or—Trader—Proof - 484
See BANKRUPTCY. 6.

LOCAL GOVERNMENT — *By-laws — Validity— Erection of New Buildings—Local Authority.*

The appellant was convicted under a by-law, made under the Leeds Improvement Acts by the council of the city of Leeds, by which any person erecting any new building without giving twenty-one days' notice in writing of his intention to the corporation, or without having the plans approved of by the corporation, or in anywise contrary to plans and sections which had been approved by the corporation, was made liable to a penalty. It was not shewn whether or not the buildings erected by the appellant complied with the Leeds Improvement Acts. These Acts gave a right of appeal to quarter sessions from any determination of the corporation under the Acts:—

Held, that, having regard to the special provisions of the Acts, the by-law was reasonable and valid, and the appellant was rightly convicted. COOK *v.* HAINSWORTH - - 85

2. —— *Sewer, or Drain—Single Drain draining several Houses—Liability to Repair—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe passing through private property had, from a date prior to 1890, received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority of the district, who had adopted the Public Health Acts Amendment Act, 1890, gave the owners of the said houses notice under s. 41 of the Public Health Act, 1875, to repair it, and, on failure of the owners to comply with the notice, executed the necessary work themselves, and claimed to recover from the owners the expenses incurred by them in so doing:—

Held, that the pipe in question was a "single private drain" within the meaning of s. 19 of the first-mentioned Act, and that the local authority were entitled to recover.

Self v. *Hove Commissioners* ([1895] 1 Q. B. 685) followed.

Hill v. *Hair* ([1895] 1 Q. B. 906) disapproved. BRADFORD *v.* MAYOR, &C., OF EASTBOURNE 205

3. —— *Sewers—New Street—Main Outfall Sewer—Expense of Constructing—Building Plans —Refusal of Local Authority to Approve—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 150, 157, 277.

An owner of land in a rural sanitary district, who proposed to lay it out as a building estate and to erect on it blocks of houses arranged in streets, deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the middle of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, and also the necessary main outfall sewer:—

Held, affirming the judgment of the Queen's

LOCAL GOVERNMENT—*continued.*
Bench Division, [1896] 2 Q. B. 219, that the local authority were not entitled to attach such a condition to their approval. THE QUEEN *v.* TYNEMOUTH RURAL DISTRICT COUNCIL - - C. A. 451

4. —— *Sewering, Paving, &c.—Streets—Apportionment of Expenses—Public Health Acts—Dispute as to Apportionment—Arbitration—Award—Enforcing Award under Arbitration Act*, 1889—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 180—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 12, 24.

An award under s. 150 of the Public Health Act, 1875, as to the proportion of the expenses, incurred by an urban authority in sewering and otherwise making good a street, to be borne by a person to whom notice has been given requiring him to sewer and otherwise make good a portion of the street, cannot be enforced under s. 12 of the Arbitration Act, 1889. IN THE MATTER OF AN ARBITRATION BETWEEN WILLESDEN LOCAL BOARD AND WRIGHT - - - C. A. 412

—— Right to sue if summary proceedings inadequate - - - - 353
See NUISANCE.

LONDON — *Buildings — Party Wall — London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 59, 75 (*Local*).

By s. 75 of the London Building Act, 1894, certain buildings of the warehouse class must be "divided by party walls," and party walls by other provisions of the Act must be constructed according to specified requirements. A building, to which s. 75 would apply, was proposed to be erected, some portions of it being of a much greater height than others, and the walls which divided the higher from the lower portions were to be carried up above the roof of the lower so as to form the outside walls of the higher:—

Held, that s. 75 only made a wall a party wall in respect of its dividing one portion of the building from another; so that the walls in question would cease to be party walls when carried up above the roof of the lower portions of the proposed building. DRURY *v.* ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY, LIMITED - - - - - 271

2. —— *Nuisance—Limitation of Actions—Nuisance Order, Costs of obtaining and enforcing—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 11, 117.

The limitation imposed by 11 & 12 Vict. c. 43, s. 11, of the time within which complaints or informations may be made or laid before justices applies to actions in the county court, brought under the Public Health (London) Act, 1891, s. 11, to recover costs and expenses incurred in and about obtaining and carrying into effect a nuisance order; so that such actions must be commenced within six months from the time when the costs and expenses were incurred. VESTRY OF HAMMERSMITH *v.* LOWENFELD 278

3. —— *Sewer—Drain—Liability to Repair—Sewer made without Approval of Metropolitan Board of Works or of Vestry—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250 — *Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 47, 48, 61.

The fact that the requisite sanction for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolis Management Acts, and as such vested in the vestry and repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe for the purpose of carrying off the drainage from them, which he connected with a sewer belonging to the vestry in a neighbouring street. No order for this work was given by the vestry, nor was the same sanctioned or approved of by the vestry or the Metropolitan Board of Works:—

Held (affirming the judgment of a Divisional Court, [1896] 2 Q. B. 95), that the pipe so laid was a sewer within the meaning of s. 250 of the Metropolis Management Act, 1855, and was consequently vested in the vestry and repairable by them. THE QUEEN *v.* VESTRY OF ST. MATTHEW, BETHNAL GREEN - - - C. A. 319

LONDON—*continued.*

MARINE INSURANCE—Judgment for salvage—Action against underwriter - 455
See ESTOPPEL.

—— Life salvage—Lloyd's policy - - 16
See INSURANCE, MARINE.

MARRIED WOMAN.
See Cases under HUSBAND AND WIFE.

—— "Carrying on a trade" — Receiving order - - - - - 407
See BANKRUPTCY. 5.

—— Costs—Security for—Appeal - - 375
See PRACTICE. 2.

MASTER AND SERVANT—Joinder of plaintiffs—Several causes of action - 113
See PRACTICE. 8.

MAYOR'S COURT—*Appeal, Notice of—Practice—Extension of Time—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*)—*Order* LIX., *r.* 16.

Order LIX., r. 16, does not give the High Court power to extend the time for giving notice of appeal under s. 8 of the Mayor's Court of London Procedure Act, 1857. KIRBY *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY C. A. 99

MENS REA—Sale of food in altered state 65
See ADULTERATION.

METROPOLIS.
See LONDON.

MINE—*Information, by whom it may be laid—Inspection of Mines—Agent*—11 & 12 *Vict. c.* 43, *s.* 10—*Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *s.* 35.

An information against the owner or agent of a mine for an offence under the Metalliferous Mines Regulation Act, 1872, which can be prosecuted before a court of summary jurisdiction may, if the inspector of mines of the district has determined to prosecute, be laid in his name by an agent duly authorized by him in that behalf. FOSTER *v.* FYFE - - - - 104

MISCHIEVOUS ANIMAL—Evidence of scienter —Negligence - - - 109
See DAMAGES.

MORTGAGE — *Practice—Attornment — Power to Enter and Determine the Tenancy—Tenancy at Will — Action by Mortgagee for Possession — Order III., r. 6 (F); Order XIV.*

A mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee at a yearly rental payable half-yearly, and a further clause by which the mortgagee might at any time, without giving any previous notice of his intention so to do, enter upon and take possession of the premises, and determine the tenancy created by the attornment. The rent was in arrear, and the mortgagee brought an action to recover possession, and applied for an order for recovery of the premises under Order XIV.:—

Held, that the claim to recover possession was founded on the determination of a tenancy at will, and not on forfeiture, and that the writ could be specially indorsed under Order III., r. 6 (F), and judgment signed under Order XIV. KEMP *v.* LESTER - - - C. A. 162

NEGLIGENCE—Mischievous animal—Evidence of scienter - - - - 109
See DAMAGES.

NOTICE—Appeal—Extension of time—Practice - - - - - 99
See MAYOR'S COURT.

—— Bankruptcy — Foreigner out of jurisdiction - - - - - 476
See BANKRUPTCY. 3.

—— Intention to suspend payment—Solicitor's letter - - - - - 124
See BANKRUPTCY. 1.

NUISANCE—*Local Government—Action by Local Authority—Right to Sue if Summary Proceeding inadequate—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 107.

The Public Health Act, 1875, enacts in s. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance:—

Held, that such proceedings must be ordinary proceedings known to the law, and that, in the absence of special damage, a local authority cannot sue in respect of a public nuisance except by action in the nature of an information with the sanction of the Attorney-General.

Wallasey Local Board v. *Gracey* (36 Ch. D. 593) approved. TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON & SONS - C. A. 353

—— Limitation of actions—Costs of obtaining and enforcing order - - 278
See LONDON. 2.

PARTIES—Change of—Death of plaintiff - 159
See PRACTICE. 9.

PARTNERSHIP—Proof—"Share of profits"—"Loan" - - - - 484
See BANKRUPTCY. 6.

PARTY WALL—Metropolis - - - 271
See LONDON. 1.

PATENT—Licence to use, in colony—Stamp
See REVENUE. 4. 179

POLICY.
See INSURANCE.

POLLUTION OF RIVERS — Interrogatories — Practice - - - - 297
See PRACTICE. 6.

POOR-RATE — *County Council—Offices of—Exemption—Joint Occupation by Quarter Sessions and County Council—Rateability.*

Premises used by a county council for the purposes of the administrative business of the county are not exempt from rating.

Premises were jointly occupied by the quarter sessions of a county and the county council:—

Held, that the occupation must be apportioned, and that to the extent to which the premises were occupied by the county council they were rateable. COUNTY COUNCIL OF MIDDLESEX *v.* ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION 143

2. —— *Public Park—Rateable Value—Beneficial Occupation—London County Council—London Council (General Powers) Act*, 1890 (53 & 54 *Vict. c. ccxliii.*), *ss.* 4, 5.

The appellants, a county council upon whom was not imposed any duty to provide a park for the use of the public, were empowered by statute to acquire by purchase and accordingly acquired certain hereditaments, which were by the terms of the statute, if acquired by the appellants, to be held and maintained by them as a park for the perpetual use thereof by the public for exercise and recreation. The necessary expenses of maintaining the park exceeded any sums of money which the appellants could derive from licences for the supply of refreshments therein, or for grazing rights, or otherwise. The appellants having been rated to the relief of the poor in respect of the park:—

Held (reversing the judgment of a Divisional Court, [1895] 2 Q. B. 511) that, the occupation of the park not having any net annual value, the rate could not be supported. LONDON COUNTY COUNCIL *v.* CHURCHWARDENS AND OVERSEERS OF LAMBETH - - - - - C. A. 25

—— Appeal—"Criminal cause or matter" 344
See PRACTICE. 3.

POSSESSION—"Without lawful excuse"—Die for making fictitious stamp - 310
See POST OFFICE.

POST OFFICE—*Die for making fictitious Stamp—Possession "without lawful Excuse"—Post Office (Protection) Act*, 1884 (47 & 48 *Vict. c.* 76), *s.* 7 (*c*).

By s. 7 (*c*) of the Post Office (Protection) Act, 1884, "a person shall not make, or, unless he shews a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp."

The proprietor of a newspaper circulating among stamp-collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage-stamp could be produced. The only purpose for

POST OFFICE—*continued.*

which the die was ordered by him, and was subsequently kept in his possession, was for making upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement," illustrations in black and white and not in colours of the colonial stamp in question, this special supplement being intended for sale as part of his newspaper:—

Held, that the possession of a die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse within the meaning of the above section. DICKINS *v.* GILL - - - - - - 310

PRACTICE—*Appeal — Appeal from Chambers—Leave to revoke Submission to Arbitration—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An appeal from a judge at chambers granting leave to revoke a submission to arbitration lies to the Court of Appeal and not to a Divisional Court. *In re* AN ARBITRATION BETWEEN THE PORTLAND URBAN DISTRICT COUNCIL AND TILLEY & Co. - - - - - - - 98

2. —— *Costs—Security for Costs—Appeal—Married Woman—Attachment—Order* LVIII., *r.* 15.

The question whether an order shall be made for security for the costs of an appeal to the Court of Appeal is in all cases a matter for the discretion of the Court. *Semble*, however, that, as a general rule, such an order will not be made where the appeal is against an order for attachment. HOOD BARRS *v.* HERIOT - C. A. 375

3. —— "*Criminal Cause or Matter*"—*Poor-rate—Application for Distress Warrant — Case stated by Justices—Appeal to Court of Appeal—Judicature Act* (36 & 37 *Vict. c.* 66), *s.* 47.

A judgment upon a special case stated by justices on an application to enforce payment of a poor-rate by warrant of distress is a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, inasmuch as the proceedings before the justices may end in imprisonment of the person in default; and therefore an appeal will not lie to the Court of Appeal from the judgment of the Queen's Bench Division on such a case. SEAMAN *v.* BURLEY - - C. A. 344

4. —— *Discovery — Interrogatories — Action against Company — Application to Interrogate Member — Notice of Application — Order* XXXI., *r.* 5.

Where, a joint stock company being a party to an action, an application is made by the opposite party for an order allowing the delivery of interrogatories to a member of the company under Order XXXI., r. 5, notice of the application ought, as a rule, to be served upon him. CHADDOCK *v.* BRITISH SOUTH AFRICA COMPANY - C. A. 153

5. —— *Discovery — Interrogatories—Libel—Circulation of Newspaper.*

The plaintiff in an action for libel against the proprietors of a local newspaper having administered an interrogatory to the defendants asking how many copies were printed and circulated of the issue of the newspaper which contained the alleged libel, the defendants answered

PRACTICE—*continued.*

that a considerable number of copies of that issue were printed and published:—

Held, that the answer was sufficient.

Parnell v. *Walter* (24 Q. B. D. 441) overruled on this point. WHITTAKER *v.* SCARBOROUGH POST NEWSPAPER COMPANY - - - C. A. 148

6. —— *Interrogatories—Pollution of Rivers—Proceedings in County Court—Whether Civil or Criminal—Right of Complainant to Interrogate—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.

By s. 3 of the Rivers Pollution Prevention Act, 1876, every person who causes or knowingly permits sewage matter to flow into any stream shall be deemed to have committed an offence under the Act. By s. 10, a summary order may be obtained in the county court requiring any person to abstain from the commission of an offence against the Act, and any person making default in complying with such order shall pay to the person complaining such sum, not exceeding 50*l.* a day for every day during which he is in default, as the Court may order, and such penalty shall be enforced in the same manner as any debt adjudged to be due by the Court. Proceedings having been commenced in the county court for an order requiring the corporation of a borough to abstain from causing or permitting sewage to flow into a stream:—

Held (affirming the decision of the Queen's Bench Division ([1896] 2 Q. B. 53)), that the proceedings were not of a criminal or penal nature, and therefore that the complainants might interrogate the corporation. *In re* COUNTY COUNCIL OF DERBYSHIRE AND MAYOR, &C., OF BOROUGH OF DERBY - - - C. A. 297

7. —— *Joinder of Defendants—Alternative Relief—Claim against Charterer for not Loading Cargo—Claim against Agent for Breach of Warranty of Authority—Order* XVI., *rr.* 5, 7, 11.

In an action against the defendants for breach of warranty of authority, it appeared that they had assumed to act as agents in entering into a charterparty for loading the plaintiffs' vessel with a cargo which was not supplied. The plaintiffs, being in doubt as to whether the defendants had or had not authority, applied to add the alleged principals as defendants:—

Held, that the plaintiffs were entitled to do so on the authority of *Honduras Ry. Co.* v. *Tucker* (2 Ex. D. 301), and *Massey* v. *Heynes & Co.* (21 Q. B. D. 330), which are not affected by the decision of the House of Lords in *Smurthwaite* v. *Hannay* ([1894] A. C. 494). BENNETTS & Co. *v.* MCILWRAITH & Co. - - - C. A. 464

8. —— *Joinder of Plaintiffs—Several Causes of Action—County Court Rules*, 1889, *Order* III., *r.* 1; *Order* XLIV., *r.* 18—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 6, *sub-s.* 3.

Order XLIV., r. 18, of the County Court Rules does not enlarge the power of joinder of plaintiffs given by Order III., r. 1, nor allow of persons being joined as plaintiffs in actions under the Employers' Liability Act who could not have been so joined in actions of other kinds.

By the flooding of a mine of the defendants fifty miners, who were in their employment, were drowned. Thereupon fifty persons, being relatives

PRACTICE—*continued.*
respectively of the deceased miners, joined in bringing an action in the county court against the defendants under Lord Campbell's Act and the Employers' Liability Act in respect of their deaths, which were alleged to have been caused by the negligence of the defendants or their servants:—

Held, affirming the judgment of the Queen's Bench Division, that, as their causes of action were several, they could not be joined in one action. CARTER *v.* RIGBY & Co. - **C. A. 113**

9. —— *Parties—Change of Parties—Death of Plaintiff—Survival of Cause of Action—Action for Mandatory Injunction—Statutory Duty on part of Defendants—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

An action was commenced by a manufacturer for a mandamus to compel the defendants, under the Public Health Act, 1875, s. 15, and the Rivers Pollution Prevention Act, 1876, s. 7, to make a sewer to enable the plaintiff to dispose of the liquids proceeding from his factory. The plaintiff died, and his executors applied to be substituted as plaintiffs:—

Held, that as the alleged cause of action arose out of a statutory duty to the deceased it survived to his executors. PEEBLES *v.* OSWALDTWISTLE URBAN DISTRICT COUNCIL - - **C. A. 159**

—— Affidavit sworn before solicitor of grantee —Validity of bill of sale - - **372**
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PRINCIPAL AND SURETY—Surety for whole debt, but liability limited in amount **12**
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QUARTER SESSIONS—Appeal from licensing justices - - - - **306**
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RAILWAY—*Fence—Construction of after Railway open for Five Years—Obligation of Company to Maintain—Accommodation Works—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 68, 73.

By s. 68 of the Railways Clauses Act, 1845, "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (inter alia) sufficient . . . . fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting . . . . the cattle of the owners or occupiers thereof from straying thereout." By s. 73, "the company shall not be compelled to make any further or additional accommodation works . . . . after . . . . five years from . . . . the opening of the railway for public use."

In consequence of the defective condition of a fence belonging to the defendants, a railway company, and separating their railway from land in the occupation of the plaintiff, a colt of the plaintiff escaped from that land through the fence on to the land of the defendants, where, owing to the dangerous nature of the premises, it suffered injury. The fence in question was first erected by the defendants more than five years after the opening of the railway for public use:—

Held, that s. 73 did not relieve the defendants from the obligation to maintain the fence in a sufficient state of repair. DIXON *v.* GREAT WESTERN RAILWAY COMPANY - - **333**

2. —— *Footpath—Bridge—Mandamus—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 46, 49, 50, 61.

Sect. 46 of the Railways Clauses Consolidation Act, 1845, does not impose upon a railway company, whose line crosses a public footpath, the obligation of carrying the footpath over the railway or the railway over the footpath by means of a bridge. THE QUEEN ON THE PROSECUTION OF THE DARTFORD RURAL DISTRICT COUNCIL *v.* BEXLEY HEATH RAILWAY COMPANY - **C. A. 74**

3. —— *Railway and Canal Traffic—Regulation—Application for Disintegration of Charge—Charge below Statutory Maximum—Sufficiency of Answer—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 33, *sub-s.* 3.

Where an application is made under s. 33, sub-s. 3, of the Railway and Canal Traffic Act, 1888, to the secretary of a railway company by a person interested in a conveyance of merchandise over the railway for an account dividing the charge made for carriage and distinguishing the charge made for conveyance on the railway from the terminal charges (if any) and from the dock charges (if any), it is sufficient, if the total charge made is below the company's statutory maximum charge for conveyance, for the railway company to make a formal answer that the whole charge is in respect of conveyance, and that no charge is made in respect of terminals or of dock charges. NEW UNION MILLS COMPANY *v.* GREAT WESTERN RAILWAY COMPANY - - - **R. C. C. 290**

—— Power to grant right of way—Compensation - - - - - **439**
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See BANKRUPTCY. 5.

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See COUNTY COURT. 2.

RENT-CHARGE — *Augmentation of Benefice—Charge upon Land—Release of Part of Land——Liability of Tenant of Residue*—29 *Car.* 2, *c.* 8.

An augmentation had been granted under

RENT-CHARGE—*continued.*

29 Car. 2, c. 8, "An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies," and charged upon land, and a portion of such land was held by the defendant as tenant for life in possession, having been acquired by the defendant's predecessors under a contract, whereby they released the residue of the land from the burden of the charge, and indemnified the owners against it.

In an action to recover from the defendant the whole amount of the arrears of the charge :—

Held, that the defendant was liable for the whole amount, notwithstanding that the annual profits of his land fell short of the amount of the charge. PERTWEE *v.* TOWNSEND - - 129

REPAIR—Fence—Obligation of company to maintain - - - - 333
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—— Sewer—Liability - - - 319
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See HUSBAND AND WIFE. 2.

—— Inquiry as to separate property—Examination - - - - - 338
See HUSBAND AND WIFE. 1.

REVENUE—*Excise—Licence to deal in Plate—Secretary of Watch Club—Inland Revenue Act*, 1867 (30 & 31 *Vict. c.* 90), *ss.* 1, 3, 17.

By s. 17 of the Inland Revenue Act, 1867, a penalty is imposed upon persons soliciting, taking, or receiving orders for articles, for the dealing in, retailing or selling which an excise licence is required, without having in force a proper excise licence, with a proviso that the section is not to be deemed to impose a penalty upon a bonâ fide traveller taking orders for goods which his employer is duly licensed to deal in or sell.

A watchmaker in London, holding an excise licence to deal in plate at his place of business in London, was the proprietor of a "watch club" in a provincial town. The secretary of the club, a clerk in the town, obtained members from among his fellow employees, receiving from each member a weekly subscription, which he forwarded to the watchmaker. A ballot was held at intervals among the members; the member who was successful at the ballot chose a watch from a catalogue of the watchmaker's goods; the secretary communicated his choice to the watchmaker and received from him a watch, which he handed over to the member. The secretary, who had no excise licence to deal in plate, was paid by the watchmaker a commission upon the amount collected by him :—

Held, that the secretary of the club was a person soliciting, taking, or receiving orders for an exciseable article without having in force a proper excise licence within the meaning of the above section, and that he did not come within the proviso in favour of bonâ fide travellers therein contained. KILLICK *v.* GRAHAM. LINTERN *v.* BURCHELL - - - - - 196

REVENUE—*continued.*

2. —— *Income Tax—Deductions—Colliery—Subscriptions to Coal Owners' Association—Money wholly laid out for Purposes of Trade—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Rules applying to First and Second Cases, rule* 1.

The owners of a colliery were subscribers to a coal owners' association, which indemnified its subscribers against losses occasioned by strikes. In returning the profits of the colliery for income tax purposes they claimed to deduct the yearly average excess of their contributions over the amounts received by them as indemnities :—

Held, that the money sought to be deducted was not money wholly and exclusively laid out for the purposes of trade, and therefore the deduction could not be allowed. RHYMNEY IRON COMPANY *v.* FOWLER (SURVEYOR OF TAXES) 79

3. —— *Stamp—Agreement in consideration of Fixed Weekly Payments—"Bond, Covenant, or Instrument"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched.*

By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2*s.* 6*d.* for every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable.

By an agreement under seal between the owner and the manager of a hotel, the manager was until determination of the agreement to carry on the business of hotel proprietor, and to have entire control of the business without interference by the owner; he was to receive the whole of the receipts and profits, to pay all necessary outgoings, and to pay to the owner a fixed sum per week. No period was fixed for the duration of the agreement, which contained powers for its determination by either party in certain events; it was ipso facto to determine on the death of the manager. The agreement was not to operate as a demise to the manager, nor to constitute a partnership between the parties :—

Held, that the agreement was a security for an indefinite period for a sum of money at weekly periods, and not for an annuity or yearly sum payable by weekly instalments, and was therefore liable to ad valorem duty upon the sum agreed to be paid weekly, and not upon the total amount of such weekly payments for a year. CLIFFORD *v.* COMMISSIONERS OF INLAND REVENUE - 187

4. —— *Stamp—Conveyance on Sale—Colonial Patent—Licence to use Patent in Colony—"Property locally situate out of the United Kingdom"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

A share in a patent granted in New South Wales, and a sole licence to use in a specified

REVENUE—*continued.*

district of New South Wales the invention protected by the patent, are "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and do not come within the exception in that sub-section in favour of "lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom." An agreement made in England for the sale of the share in the patent and of the licence is, therefore, liable to ad valorem stamp duty under that sub-section as though it were an actual conveyance on sale. SMELTING COMPANY OF AUSTRALIA *v.* COMMISSIONERS OF INLAND REVENUE - 179

5. —— *Stamp — Foreign Firm — English Trade-mark and Goodwill—"Property"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By an agreement made in England the appellants, a limited company, bought from a firm of soap manufacturers in the United States their freehold works, book and other debts, together with the goodwill of the business and the trade-marks used in connection therewith. The vendors were the owners of a trade-mark, registered in England, relating to their soap, which trade-mark was extensively circulated throughout England in newspapers and pictorial advertisements at the expense of the vendors, who had an office in London for that purpose, and by this means a large demand for the soap had been created in the United Kingdom. The vendors did not sell direct to the retail dealers in the United Kingdom, but to a syndicate of three firms, who gave orders for soap which was despatched to them in England and paid for by them by remittances sent to the vendors; the syndicate then resold it to retail dealers and others at such prices as they thought fit; about two-thirds of the total sales of the vendors were made to the English syndicate:—

Held, that the English trade-mark and goodwill were "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891, and that the agreement was liable in respect of them to ad valorem stamp duty. BENJAMIN BROOKE & CO. *v.* COMMISSIONERS OF INLAND REVENUE - 356

6. —— *Succession Duty—Succession—Annuity—Contract for Valuable Consideration in Money or Money's worth—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 17.

Lord W. by his will bequeathed certain bank shares on trust to pay his nephew H., who was the heir to the title, an annuity of 15,000*l.*, and to accumulate the surplus for a term for his benefit, and devised his residuary estate in trust for his wife for life, and after her decease in trust for the said H., if then living, but if dead in trust for the person who should then be the testator's right heir at common law. H. succeeded to the title, but died without issue in the lifetime of the testator's widow, and was succeeded by his brother, the defendant. The testator left five nieces, daughters of a brother older than the defendant's father, who in the event of their surviving the testator's widow (as in fact they did) would be the testator's co-heiresses and entitled to his residuary estate. A deed of arrangement was thereupon executed, to which the widow, the co-heiresses, and the defendant

REVENUE—*continued.*

were parties, by which the widow assigned her interest in the bank shares (which had then fallen into the residue) and the co-heiresses and the defendant assigned their respective interests under the will to trustees upon (inter alia) the following trusts: by clause 1, subject to the widow's life interest, an annuity of 15,000*l.* was during her life to be paid to the defendant for life, and annuities were to be paid to each of the co-heiresses; by clause 2, after the death of the widow, the trustees were, until the determination of the trusts for accumulation under the deed, to "continue to pay the said annuity of 15,000*l.*" to the person for the time being holding the title during his life; then followed trusts for the payment of 100,000*l.* to each of the co-heiresses, with an ultimate trust of the surplus in favour of the defendant. Upon the death of the widow the Crown claimed succession duty from the defendant in respect of the annuity to which he became entitled under clause 2 of the deed:—

Held, that the annuity granted by clause 2, being derived from the estate of the co-heiresses, was not the same annuity as that granted by clause 1, which was derived from the widow's life estate, but was a new annuity, to which the defendant on the death of the widow became entitled as successor; that the arrangement made by the deed was not a contract made by the defendant "for valuable consideration in money or money's worth" within the meaning of s. 17 of the Succession Duty Act, 1853; and that succession duty was therefore payable by the defendant. ATTORNEY-GENERAL *v.* BARON WOLVERTON - - - - - - 389

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SALE OF GOODS—*Contract—Warranty—Implied Condition as to Fitness of Goods—Evidence—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.

By the Sale of Goods Act, 1893, s. 14, where

SALE OF GOODS—*continued.*
goods are supplied under a contract of sale, and "the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

Coals were supplied under a written contract of sale containing no mention of the particular purpose for which they were required, though prior to the making of such contract the buyers made known that purpose to the sellers, who were coal agents, and relied on their skill and judgment. In an action for damages for breach of warranty by the sellers:—

Held, that evidence of what took place between the parties prior to the making of the contract was admissible to raise the implication of the condition specified in s. 14, and, therefore, by virtue of that section a warranty or condition by the sellers that the coals were reasonably fit for the purpose for which they were required must be implied:

Held, also, that a contract for the sale of coals under a particular description known in the coal trade, was not "a contract for the sale of a specified article under its patent or other trade name" within the meaning of the proviso to s. 14. GILLESPIE BROTHERS & CO. *v.* CHENEY, EGGAR & CO. - - - - - - 59

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See BANKRUPTCY. 10.

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See LONDON. 3.

SHIP—*Bill of Lading—Excepted Perils—Restraint of Princes—Contraband of War—Risk of Seizure—Contract of Carriage Partly Performed—Justification of Refusal to Complete.*

The plaintiffs shipped goods which were contraband of war on the defendants' ship for carriage from London to Yokohama under a bill of lading containing the exception of "restraint of princes," and also a special clause that "if the entering of or discharging in the port (of discharge) shall be considered by the master unsafe by reason of war . . . . the master may land the goods at the nearest safe and convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, and on the day of her arrival there war was declared between China and Japan. There were at that time several Chinese war-vessels in and round the port of Hong Kong, and if the master had attempted to sail thence with the plaintiffs' goods on board there would have been a serious danger of their being seized and confiscated. The master accordingly landed them there. In an action for breach of contract to carry the goods to Yokohama:—

Held, (1.) that the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception; (2.) that such risk of seizure, on the voyage between Hong Kong and Yokohama, rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3.) that the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing the plaintiffs' goods where he did. NOBEL'S EXPLOSIVES COMPANY *v.* JENKINS AND COMPANY - - - - - 326

2. —— *Tonnage—Measurement of—Deck Cargo—Horses and Cattle—Light Dues—Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.

Horses and cattle are "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876, which provides that, where timber, stores, or other goods are carried as deck cargo, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods.

For the purposes of the computation of such tonnage, the measurement ought to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and ought not to include the shed or pens belonging to the ship in which the animals are confined. RICHMOND HILL STEAMSHIP COMPANY *v.* CORPORATION OF TRINITY HOUSE C. A. 134

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—— Salvage, judgment for — Action against underwriter - - - - 455
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SHORE—Rights of owner—Thames Conservancy Act - - - - - 360
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THAMES—*Sand—Right to take—Conservators—Rights of Owner of Shore—"Bed"—"Shore"—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 3, 87.

Sect. 87 of the Thames Conservancy Act, 1894, makes it unlawful for any person other than the conservators, their agents, &c., to dredge or raise sand from the bed of the Thames, except with the licence of the conservators. The appellant raised sand, without such licence, from a place between high and low water-mark of the Thames, within the district of the conservators. He claimed to take the sand under a licence from a lessee, holding under a lease, which demised the right to take sand from the place in question.

Held, that the place was part of the "shore" of the river, within the meaning of s. 3, not of the "bed," within the meaning of s. 87, that the Act did not interfere with the right of the lessee to license the appellant to take sand, and therefore the appellant could not be convicted of an offence against the Act. PEARCE *v.* BUNTING. THE QUEEN *v.* WEDD. *Ex parte* PEARCE - - 360

THEATRE—*Licence—Grant of—Discretion to attach Condition to Grant—"Discretion"—6 & 7 Vict. c.* 68.

A county council acting as the licensing authority for the performance of stage plays may, in the exercise of their discretion, attach to the grant of a licence for such performances a condition that the grantee shall undertake not to apply to the excise authorities under 5 & 6 Will. 4, c. 39, s. 7, for an excise licence to sell intoxicating liquors in his theatre. THE QUEEN *v.* COUNTY COUNCIL OF WEST RIDING OF YORKSHIRE - - 386

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